(17,856.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 124.

THE FRENCH-GLENN LIVE STOCK COMPANY, PLAINTIFF IN ERROR,

vs.

ALVA SPRINGER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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1 *Transcript.*

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant,
vs.
ALVA SPRINGER, Respondent.

Appeal from the circuit court of Harney county—Hon. Morton D. Clifford, judge.

Thornton Williams and C. W. Parrish, att'ys for appellant.
L. R. Webster and John Cummins, att'ys for respondent.

Be it remembered, that heretofore, on the 27th day of November, 1896, a complaint was filed in the office of the clerk of the circuit court, in and for the county of Harney, in words and figures, as follows:

In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
v.
ALVA SPRINGER, Defendant.

Pl'ff complains that pl'ff is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office or place of business in Chico said State, and doing business as a live-stock raising and cattle company in the State of Oregon and elsewhere.

II.

That plaintiff is the owner and entitled to the immediate possession of the following-described real property, situate in Harney county, State of Oregon and more particularly described as follows to wit:

Beginning at the northeast corner of lot two of section thirty-five in township twenty-six south range thirty-one east of the
2 Willamette meridian south of Malheur lake in said county of Harney and State of Oregon as appears on the maps of survey of the said township in the office of the register and receiver of the U. S. land office at Burns, Oregon, running from said point north one-quarter of a mile or thereabouts; thence west one mile or thereabout; thence south one-quarter of a mile or thereabout to the point of the fence enclosing said premises at or near the northwest corner of lot 3 of section thirty-four in said above-mentioned township and range, east of said meridian and south of said lake in said county and State according to said map thence easterly following the meander line of said lake as shown by and upon said map to the place of beginning, containing 160 acres of land or thereabout, and that the estate of plaintiff in the said property is in fee-simple absolute and that plaintiff is entitled to the possession thereof and to the whole thereof.

III.

That the defendant Alva Springer unlawfully and wrongfully withholds the same from plaintiff to plaintiff's damages as follows: That said Alva Springer wrongfully and unlawfully maintains and has maintained for more than six years last past and since about the year 1888 a fence enclosing said premises and has kept; herded and maintained a large number of cattle thereon, whereby the said cattle have trampled down, eaten out and otherwise destroyed a large portion of the native grasses of said lands and deprived the plaintiff of the same to the plaintiff's damage of 50 cents an acre for each of said six years so last past for each and every acre of which pl'ff has been so deprived making an aggregate total of four hundred and eighty dollars.

IV.

That the defendant notwithstanding demands of possession frequently made by pl'ff for said property has during all of said time above mentioned unlawfully and wrongfully withheld and still unlawfully and wrongfully withholds and detains the same and each and every part and parcel thereof from the pl'ff and wrongfully and unlawfully denies pl'ff's right to the possession of the same or any part thereof to pl'ff's damages as hereinbefore stated.

3 Wherefore plaintiff demands judgment for the possession of the said real property hereinabove described and each and every part and parcel thereof and for the sum of $480 damages for withholding the property for the term of six years next preceding the commencement of this suit, besides the costs and disbursements of this action.

CHARLES W. PARRISH,
VICTOR G. COZAD, AND
THORNTON WILLIAMS,
Att'ys for Pl'ff.

STATE OF OREGON, }
County of Harney, } *ss:*

I, Peter French, being first duly sworn say that I am the president of The French and Glenn Life Stock Company, plaintiff in this suit. That the foregoing complaint is true as I verily believe.

PETER FRENCH.

Subscribed and sworn to before me this 27th day of November, 1896.

H. KELLEY,
County Clerk.

4 And afterwards, on the 9th day of December, 1896, there was filed in the office of said clerk a demurrer in words and figures as follows:

In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Comes now the defendant and demurs to the complaint filed herein on the ground that the same does not state facts sufficient to constitute a cause of action.

ALVA SPRINGER, *Defendant.*

5 And afterwards, on the 15th day of May, 1897, there was filed in the office of said clerk a summons in words and figures as follows:

In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

To Alva Springer, the above-named defendant:

In the name of the State of Oregon, you are hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you if served within this county, or if served within any other county of this State, then within twenty days from the date of the service of this summons upon you; and if you fail so to answer for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to wit, the possession of the real property therein described, and the sum of $480 damages for withholding the same, and costs, and disbursements of action.

PARRISH AND COZAD AND
THORNTON WILLIAMS,
Att'ys for Pl'ff.

STATE OF OREGON, } ss:
County of Harney, }

I, A. J. McKinnon, sheriff of said State and county, do hereby certify that I served the within summons within said State and county on the 8th day of December, A. D. 1896, on the within-named defendant Alva Springer by delivering a copy thereof prepared and certified to by me as sheriff, together with a copy of the complaint in said action prepared and certified to by — to the said Alva Springer in person.

A. J. McKINNON,
Sheriff of Harney County, Oregon,
By C. A. HAINES, *Deputy.*

6 And afterwards on the 17th day of May, 1897, there was filed in the office of said clerk an answer in words and figures as follows:

In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Answer.

The defendant for answer to the complaint in the above-entitled action, alleges that:

As to whether plaintiff is a corporation duly or at all organized or existing under or by virtue of the laws of the State of California or at all or as to whether it is doing business as a live-stock raising or cattle company in the State of Oregon or elsewhere plaintiff has no knowledge or information thereof sufficient to form a belief and therefore denies the same.

I.

Denies that the plaintiff is, or at any time heretofore was the owner of, or that it is or at any time was entitled to the possession of the land and premises described in the complaint, or any part thereof.

II.

Denies that plaintiff has or at any time heretofore had, or in any manner was entitled to, an estate in fee-simple absolute, or of any estate, title, or interest of any nature or character in or to said described premises or any part thereof.

III.

Denies that he wrongfully or unlawfully, withholds said lands and premises from plaintiff to its damage or otherwise or at all.

7 IV.

Denies that he wrongfully or unlawfully maintains any fence on or enclosing the premises described in the complaint or any part thereof or that he ever has so maintained any such fence or any fence.

V.

Denies that he has at any time ever herded or maintained a large or any number of cattle on the land described in the complaint or any part thereof which have in any manner caused the plaintiff any damage whatever and denies that the plaintiff has been damaged by any act of this plaintiff (defendant) in connection with said land in the sum of four hundred and eighty dollars, or any other sum.

VI.

Denies that he now does, or ever has unlawfully withheld or detained from the plaintiff the real estate described in the complaint or any part thereof.

VII.

For a further defense he alleges that in July 1888, he located or contemplated settling upon and acquiring title under the laws of the United States, to another tract of land lying a short distance from that described in the complaint; that about that time Peter French, the president, superintendent and general manager of plaintiff, one of its principal stockholders and one of its directors having entire charge and management then and ever since of its affairs in this State, advised defendant not to remain there, but to go upon the tract of land described in the complaint, representing that it was vacant and unclaimed public land, and much more suitable for a homestead for defendant than where he at first contemplated settling.

That in pursuance of such advice and recommendation and solely because thereof defendant at once abandoned his former location and removed to and settled upon the tract described in the complaint, where he has continued to reside ever since with the knowledge of plaintiff and of said French, and with the knowledge and acquiescence of said French and said plaintiff he has made and erected permanent lasting and valuable improvements upon said land which are now of the reasonable value of five hundred dollars.

That neither said French nor the plaintiff ever notified defendant that he or it ever claimed any right to or interest in said land or any part thereof, until about August 1894, when plaintiff through said French first assumed to and did assert some pretended claim thereto, based upon the contention that the line of survey between certain land claimed by plaintiff on the north and that described in the complaint was a meander line along the margin of Lake Malheur, and that said lake margin had theretofore permanently receded leaving the land in dispute in the condition it now is.

VIII.

Defendant further alleges that said pretended meander line was run or surveyed in the year 1877, and that a new meander line was run through that part of the county in 1895, varying materially in much of its course from that run in 1877 and that neither of them was actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, but that each of said lines was run a mile or more from the actual margin of said lake, leaving a tract of public land comprising many hundreds of acres, well adapted to agricultural purposes, between said alleged meander lines and the margin of said lake, unsurveyed of which the tract here in controversy is a part; that said lands are in the same general condition, and of the general character that they were when said meander lines were run; that for a long time prior thereto, and ever since there has been as defendant is informed and believes, no appreciable recession of the waters of said lake, nor have there been any appreciable accretions of land along that side of said lake nearest the land in controversy; the lands here claimed

are not accretions, nor are they lands made suitable for agriculture by the recession of the waters of said lake since plaintiff acquired title to any of the lands adjoining them or since said surveys.

9 Wherefore having fully answered herein defendant demands judgment for his costs and disbursements herein.

JOHN CUMMINS &
L. R. WEBSTER,
Attorneys for Defendant.

STATE OF OREGON, }
County of Harney, } ss:

I, Alva Springer being first duly sworn say that I am the defendant named in the foregoing-entitled action, and that the foregoing answer is true as I verily believe.

ALVA SPRINGER.

Subscribed and sworn to before me this 17th day of May A. D. 1897.

A. W. GOWAN,
Notary Public for Oregon.

10 And afterwards, on the 19th day of May, 1897, there was filed in the office of said clerk a reply in words and figures as follows:

In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff, }
vs.
ALVA SPRINGER, Defendant. }

The plaintiff for reply to the affirmative matter set forth in the defendant's answer, in this action, and the further defense to plaintiff's cause of complaint, denies that in July, 1888 or any other day, date or time, he located and as to whether or not he contemplated settling upon or acquired title, under the laws of the United States, or another tract of land lying a short or other distance from that described in the complaint, plaintiff has no knowledge or information sufficient to form a belief, and therefore denies the same.

Denies that about that time, or any time or ever, or at all, Peter French, the president, superintendent or general manager of plaintiff or one of its principal stockholders or one of its directors, having entire charge or any charge or management, then or ever since, or at all of its affairs in this State, or elsewhere, or otherwise or at all, advised the defendant not to remain there, but to go upon the tract of land described in the complaint, or to go upon the tract of land described in the complaint, representing that it was vacant, or unclaimed public lands, or otherwise, or much more suitable or any more suitable for a homestead or otherwise for defendant, than where he at first contemplated settling, or otherwise represented to the defendant, as alleged or at all.

Denies that in pursuance of such or any advise or recommendation, or solely, or otherwise, because thereof, defendant at once
11 abandoned or at all abandoned his former location, as alleged, or any location, or removed to or settled upon the tract described in the complaint, where he has continued to reside ever since with the knowledge or acquiescence of the plaintiff, or of said French, or otherwise, or at all, he has made or erected permanent, lasting or valuable improvements upon said lands, which are now or at all, of the reasonable value of five hundred or any other number of dollars, or otherwise, or at all.

Denies that neither said French, nor the plaintiff ever notified the defendant that he or it, ever claimed any right to or interest in said lands or any part thereof, until about August, 1894, or any other date, or any date later than 1888, but on the contrary avers that plaintiff notified the defendant of the plaintiff's rights and interests in said lands, as early as the year 1888, as aforesaid, and many times since.

Denies that it was August, 1894, or any other date later than 1888 when said Peter French first assumed to or did assert a claim thereto, to the defendant, based upon the line of survey between certain lands claimed by plaintiff on the north, and that described in the complaint, as a meander line along the margin of Lake Malheur, and that said lake margin had theretofore permanently receded, leaving the land in this suit, in the condition it now is, and denies that said claim is a pretended claim, as alleged, or is based upon pretensions, but avers same is and was based upon facts, that the line of survey, aforesaid, was such meander line.

Admits that said meander line was run and surveyed in the year 1877, but denies that a new meander line was run through that part of the country in 1895, or any other year or at all varying materially or otherwise, in much or any of its course, from that run in 1877, and denies that said meander line, surveyed and run in the year 1877 was not actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, or that said meander line run in the year 1877 was run a mile or more or any material distance, or any distance from the actual margin of said lake, as
12 said margin was at the time of the survey of said line, or leaving a tract of public lands comprising many hundreds, or any acres or any number of acres, well or at all adapted to agricultural or other purposes, between the said alleged meander line, and the margin of said lake, unsurveyed or otherwise, or of which alleged pretended unsurveyed public lands, the tracts herein in controversy, or any part thereof, is or ever was a part; denies that said lands are in the same general condition, or of the general character, that they were when said meander line so run in 1877 was run; denies that ever since the said meander line was surveyed and run in 1877, or at any time since there has been no appreciable recession of the waters of said lake; denies that there have not been any appreciable accretions along the side of said lake, nearest the land in controversy, since said meander line was run in 1877; denies that the lands here claimed are not accretions, nor lands made suitable for

agriculture by the recession of the waters of said lake, since plaintiff acquired title to any of the lands adjoining them, or since said survey of said meander line of 1877, but on the contrary avers that the lands here claimed are accretions and are lands made suitable for agriculture by the recession of the waters of said lake, since plaintiff, its predecessors and grantors, acquired title to the adjoining lands, next south and along the said meander line of said lake as surveyed in the year 1877, which survey was duly approved by the proper officers and departments of the Government of the United States, having charge of such matters, and that the accretions, aforesaid, have occurred since said survey, and the running of said meander line in the year 1877.

Wherefore plaintiff demands judgment as in its complaint demanded.

CHAS. W. PARRISH AND
THORNTON WILLIAMS,
Plaintiff's Attorneys.

13 STATE OF OREGON, } ss:
Harney County, }

I, Peter French, being first duly sworn say that I am agent and business manager of the plaintiff named in the foregoing reply, and that said reply is true as I verily believe, and that the facts stated in said reply are within my own personal knowledge, and that the said plaintiff is a corporation existing under the laws of the State of California, and having its principal office in and place of business in said State of California.

PETER FRENCH.

Subscribed and sworn to before me this 19th day of May, 1897.
H. KELLEY, *Clerk,*
By C. A. GILHAM, *Deputy.*

14 And afterwards on the 21st day of May, 1897, there was filed in the office of said clerk a motion to postpone trial, as follows:

In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK CO., Plaintiff,
vs.
ALVA SPRINGER, Defendant. } Motion.

Comes now plaintiff above named and moves the court, based upon the affidavit of Peter French herewith filed, and upon the record on file in this action, to postpone and continue the trial of this case until the first day of the next regular term of this court hereafter to be held.

____ ____,
____ ____,
Attorneys for Plaintiff.

15 And afterwards on the 25th day of May, 1897 there was filed in the office of said clerk a motion for nonsuit, as follows:

In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK COMPANY
vs.
ALVA SPRINGER.

Comes now the defendant and moves the court for judgment of nonsuit in this case upon the following grounds and for the following reasons:

First.

For the reason that the evidence introduced by the plaintiff herein is not sufficient to justify nor to sustain a verdict in favor of the plaintiff.

Second.

For the reason that the evidence shows that the plaintiff has no title whatever to the land described in the complaint nor to any part thereof.

Third.

For the reason that the evidence does not show that the plaintiff has any title to nor interest in the land described in the complaint nor that the plaintiff is entitled to the possession thereof.

JOHN CUMMINS,
L. R. WEBSTER,
Attorneys for Defendant.

16 The honorable circuit court of the State of Oregon for the county of Harney, met at the court-house in Burns the county-seat of said county on Monday the 17th day of May A. D. 1897, the same being the third Monday in said month and the time fixed by law for holding a term of said court for said county. There being present, the Hon. Morton D. Clifford, circuit judge, Chas. W. Parrish, district attorney, H. Kelley, county clerk, A. J. McKinnon sheriff. Whereupon the following among other proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, a Corporation,
Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now at this time this matter came on for hearing, and by the consent of defendant his demurrer heretofore filed to plaintiff's complaint is overruled, and defendant files his answer herein, and plaintiff allowed until 9 o'clock tomorrow to plead thereto.

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

17 And afterwards, on the 21st day of May, 1897, it being the fifth judicial day of May term of said court, the cause came on for trial, when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now at this time this cause came on for trial, pl'ff appearing by Peter French and by his attorneys C. W. Parrish, Thornton Williams and Waters & Gowan and def't appearing in person and by L. R. Webster and John Cummins of counsel.

Whereupon the following jurors were drawn: G. W. Young, W. C. Varien, P. G. Smith, and P. C. Clemens and the hour being late the further proceedings of this case were postponed until 9 o'clock tomorrow morning.

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

18 And afterwards, on the 22nd day of May, 1897, it being the sixth judicial day of the May term of said court, the cause came on for trial, when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now on this 22d day of May 1897, this cause coming on regularly for further consideration, and to complete the full panel of the trial jury from the special venire heretofore issued by this court, the same being the selection of eight jurors the following persons were deemed qualified, and were so selected as trial jurors in this cause, to wit: Jap McKinnon, William Stewart, William Smith, Geo. Shelley, Geo. Shaw, Robert Irving, M. F. Williams, and Chas. Fields, the same making the required number of twelve jurors for the trial of this cause. And the said panel having been duly sworn to try said cause fairly and impartially upon the evidence submitted to them and under instructions of the court as to the law applicable to this case; and having received the usual and special instructions from the court, as to not allowing any persons to communicate with them concerning or make any communications to others about this cause, were excused for the day and ordered to be in their seats at half after nine o'clock Monday a. m. to further abide the order of this court.

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

19 And afterwards, on the 24th day of May, 1897, it being the seventh judicial day of the May term of said court, the cause came on for trial, when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now on this day this cause coming on regularly to be heard the trial of the same being continued from yesterday for the further taking of testimony and continuing through the day, and the hour being late this case is continued until tomorrow morning at 9 o'clock.

(Signed) MORTON D. CLIFFORD, *Judge.*

And afterwards, on the 25th day of May, 1897, it being the eighth judicial day of the May term of said court, the cause came on for trial, when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now at this time this cause coming regularly to be heard, the trial of the same being continued from yesterday for the further taking of testimony, continuing through the day and the hour being late, this cause is continued until tomorrow morning at 9 o'clock.

(Signed) MORTON D. CLIFFORD,
Circuit Judge.

20 And afterwards on the 26th day of May, 1897, it being the ninth judicial day of the May term this cause came on for trial, when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now on this day this cause coming on regularly, having been continued from yesterday for the further taking of testimony continuing through the day and the hour being late, this cause is continued until tomorrow morning at 9 o'clock.

(Signed) MORTON D. CLIFFORD,
Circuit Judge.

And afterwards, on the 28th day of May, 1897, it being the 11th judicial day of the May term of said court, the cause came on for trial when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now at this time this cause coming on regularly and for final trial and the jury after hearing the testimony, arguments of counsel

on both sides and the instructions of the court retired for deliberation upon their verdict in charge of a sworn officer.

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

21 And afterwards, on the 29th day of May, 1897, it being the 12th judicial day of the May term of said court, the cause came on for trial when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Now on this day comes the jury in the above-entitled cause, into open court in charge of their bailiff and in presence of the respective parties and their att'ys returned the following verdict.

In the Circuit Court for Harney County, Oregon.

THE FRENCH-GLENN LIVE STOCK COMPANY
vs.
ALVA SPRINGER, Defendant.

We the jury in the above action find for the defendant.

WM. M. STEWART, *Foreman.*

22 And afterwards, on the 31st day of May, 1897, there was filed in the office of said clerk a motion for new trial, as follows:

In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Comes now the plaintiff and moves for a new trial and for an order of this court at this time setting aside the verdict of the jury herein rendered and granting such new trial for the following causes and upon the following grounds, to wit:

1st. (Sixth statutory ground.) Insufficiency of the evidence to justify the verdict and that the same is against law.

2nd. (Seventh statutory ground.) Error in law occurring at the trial, and excepted to by the party making this application, to wit, the plaintiff.

CHAS. W. PARRISH,
A. W. WATERS,
THORNTON WILLIAMS,
Attorneys for Plaintiff.

23 And afterwards, on the 31st day of May, 1897, it being the 13th judicial day of the May term of said court, the cause came on for trial when the following proceedings were had:

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Comes now the plaintiff by C. W. Parrish, Thornton Williams, and Waters and Gowan its attorneys and comes also the defendant by L. R. Webster and John Cummins Esqrs. his attorneys, and comes on to be heard the motion for a new trial in this case, and the court having duly considered the matter and being fully advised in the premises now overrules and denies said motion and now said defendant by his attorneys aforesaid moves the court for judgment on the verdict of the jury heretofore rendered in his favor herein and for judgment against said pl'ff for his costs and disbursements herein, and the court being fully advised in the premises it is now ordered and adjudged that the defendants herein do have and recover of and from the pl'ff his costs and disbursements herein taxed at $281.00 *dollars* and — costs

Record signed.

MORTON D. CLIFFORD,
Circuit Judge.

24 And afterwards on the 16th day of November, 1897, there was filed in the office of said clerk, a notice of appeal in words and figures as follows:

In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK COMPANY, a Corporation, Plaintiff,
vs.
ALVA SPRINGER, Defendant.
} Notice of Appeal.

To Alva Springer, defendant, and Lionel R. Webster and John Cummins, his attorneys:

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of Oregon, from the judgment in said action made and entered in said circuit court on the 31st day of May, 1897, in favor of the defendant in this action, and against the plaintiff; which judgment is in words and figures following to wit:

"Comes now the plaintiff by C. W. Parrish, Thornton Williams, and Waters & Gowan, its attorneys, and comes also the defendant by L. R. Webster and John Cummins, Esq. as his attorneys, and comes on to be heard the motion for a new trial in this case; and the court having duly considered the matter, and being fully advised in the premises now overrules and denies said motion; and now said defendant by his attorneys aforesaid moves the court for judgment on the verdict of the jury heretofore rendered in his favor herein, and for judgment against said plaintiff for his costs and disbursements herein; and the court being fully advised in the prem-

ises, it is now ordered and adjudged that the defendant herein do have and recover of and from the plaintiff his costs and disbursements herein, taxed at $—, and costs.

(Signed) MORTON D. CLIFFORD,
Circuit Judge."

from said judgment, and from the whole thereof.

25 You will further take notice that upon said appeal said plaintiff and appellant will rely upon the following assignments of error, to wit:

The exception taken and allowed on the said trial wherein the defendant having entered upon his case-in-chief, and having among others called as a witness in his behalf one R. HUGHET, who having testified that he had attempted to locate a certain tract of land in section 3, township 27, lying south of the meander line of Malheur lake, on which was the sod-house, was asked by defendant's counsel the following question:

Q. State whether after that you had any conversation with Mr. French in respect to that?

Whereupon plaintiff's counsel objected as incompetent, irrelevant, and immaterial, the conversation called for not being in respect to the land involved in the answer, but some other tract of land; said objection having been then and there sustained by the court, the counsel for defendant asked that what he expected the witness would have answered to said question, so ruled out, be shown in the record; to which plaintiff's counsel then and there objected, whereupon defendant's counsel proceeded to state in the hearing of the jury what the answer of the witness would have been had he been allowed to answer; when he was interrupted by the counsel for plaintiff who then and there objected to defendant's counsel stating to the jury what he expected to prove by the witness Hughet, and to the court's allowing him to do so, which objection the court then and there overruled, and allowed counsel to state in the hearing of the jury what he expected to prove and show by the answer of the witness in this case, to wit, that he heard Mr. French say that he didn't claim any of the lands north of the meander line; that it was all unsurveyed land, and he made no claim to it. To which ruling, and the overruling of said objection, and allowing defendant's counsel to make such statement in the hearing of the jury, plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

26 2. G. MARSHALL, also a witness in behalf of defendant having been called, and having testified about his having land east of the defendant's land in section 26, on which, he, the witness, had raised some grain in 1891 1892 and 1893, was asked the following question:

Q. How much land did you put into grain?

Whereupon plaintiff's counsel objected as incompetent irrelevant and immaterial, which objection the court then and there overruled

and allowed the question to be put to the witness and the witness to answer the same which he did in the following words:

A: I had about three acres there first.

To which ruling of the court plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

3. The same witness being on the witness stand, to wit, said G. MARSHALL, was asked the following question:

Q. And how far are you from the Alva Springer place in dispute here?

To which he answered:

"A. About a mile."

Plaintiff's counsel objected to said question and answer upon the ground that it is incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, to which ruling plaintiff's counsel duly excepted, and said exception was then and there allowed and recorded.

4. The same witness being on the witness stand, to wit, said G. MARSHALL, was asked the following question:

"Q. About how much land did you have in grain there?"

To which he answered,

—. "About three acres."

Whereupon he was asked by defendant's counsel,

"Q. What kind of grain?"

To which last question plaintiff's counsel objected upon the grounds as before, to wit, incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, allowing the question to be put, and the witness to answer, which he did in the following words:

"A. Wheat, barley and rye."

To which ruling plaintiff's counsel duly excepted, and said exception was duly allowed and recorded.

27 5. The same witness being on the witness stand, to wit, the said G. MARSHALL, was asked the following question,

"Q. About how much land did he (meaning Rinehart) ever cultivate there?" (He, the said witness having testified that Mr. Rinehart had a claim about a mile north of the witnesse's land.)

To which question plaintiff's counsel objected as incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, and permitted the question to be put, and the witness to answer which he did as follows:

"A. Well, towards the last I think he had about five acres; he didn't have so much the first year."

To which ruling plaintiff's counsel duly objected, and said exception was then and there duly allowed and recorded.

6. L. B. SPRINGER having been called as a witness on behalf of defendant, was asked the following question:

"Q. Now state, Mr. Springer, whether you have ever raised any garden on your place there in the spring?"

To which question plaintiff's counsel objected *to* as incompetent, irrelevant, and immaterial. Which objection the court then and there *thereupon* overruled, permitted the question to be put, and the witness to answer which he did as follows:

"A. Yes sir, I have raised garden on my place and his too."

To which ruling plaintiff's counsel duly excepted and said exception was then and there duly allowed and recorded.

7. *Q.* The same witness being on the stand, to wit, L. B. SPRINGER, was asked the following question:

"Q. State whether or not there are any gardens raised on any of those places north of the meander line?"

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and no foundation laid.

Whereupon the question was withdrawn, and the following question put:

"Q. Upon the land north of the meander line and west
28 of Alva Springer's the defendant's, place are there any raised?"

To which question plaintiff's counsel objected *to* as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, and permitted the question to be put and the witness to answer as follows:

"A. Yes sir."

To which ruling plaintiff's counsel then and there duly excepted, and said exception was then and there duly allowed and recorded.

8. *Q.* THOMAS JONES having been called as a witness for the defendant was asked as follows:

"Q. You are the register of the land office here, are you not Mr. Jones?
A. Yes sir.
Q. What is that you have in your hand, sir?
A. Our official plat of township 25, south, range 32 east.
Q. On file in your office?
A. Yes sir."

A certified copy of same is here offered in evidence by the defendant, the same showing the meander line.

To the introduction of which plaintiff objects as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, and permitted the same to be introduced in evidence and shown to the jury and marked Exhibit "2" defendant's proof.

To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

9. The defendant having called ALVA SPRINGER in his own behalf, was examined by defendant's counsel as follows:

"Q. Where do you live Mr. Springer?
A. I live near the sod-house near the mouth of Blitzen river.
Q. In this county and State?
A. Yes sir.
Q. You are the defendant in this case, I believe?
A. Yes sir.
Q. Are you a married man?
A. Yes sir.
29 Q. Have a family?
A. Yes sir, a wife and two children.
Q. And you live there on this land in controversy as your house, (home) do you?
A. Yes sir.
Q. When did you first come there?
A. I went there in July, 1888.
Q. Did you see Mr. French when you first went there?
A. No sir, I seen him a few days before I went there.
Q. I mean when did you first come to that part of the country?
A. In June, 1888, was the first time.
Q. Where did you go when you first went there, what part or particular portion of land there in that vicinity did you go on?
A. I went on a piece of land south of this.
Q. About how far south of where you are now?
A. Well, south and east something over a quarter of a mile, between that and a half a mile.
Q. Did you see Mr. French when you first went there on that land?
A. No sir, not at that time.
Q. Where did you go after having gone there on that land; what do you mean by going on that piece of land; what did you do with it?
A. I located the piece of land there and put some lumber on that.
Q. For what purpose?
A. I calculated to locate there.
Q. What did you put the lumber there for?
A. For a house.
Q. After that where did you go?
A. Back to Harney.
Q. For what purpose?
A. To get some more lumber and my family.
Q. What did you do when you got to Harney?
A. I went to the saw-mill and got some more lumber and started back down there.

Q. With your family?
A. Yes sir.
Q. When did you see Mr. French then?
A. I met Mr. French there near the sod-house as I went back.
Q. Did you know him at that time?
A. By sight, yes sir.
Q. Did you have any conversation with him there?
A. I met Mr. French right on this side of Saddle Butte something like a mile or so; my wife was driving the team and I was driving some milk cows. I was off to the side of the road a little
30 ways, and Mr. French was in a cart, I think, anyway he was in a rig of some kind; and he drove out to where I was and asked me if I was the man——

Here witness was interrupted by counsel for plaintiff who here objects to any statement of any conversation between this defendant and Mr. French, as incompetent, irrelevant, and immaterial, hearsay and not the best evidence. Which objection the court thereupon overruled and permitted the witness to continue.

To which ruling plaintiff's counsel then and there duly excepted, and the said exception was then and there duly allowed and recorded; and witness continued as follows: "And he asked me if I was the man who had some lumber down west of the sod-house; I told him that I was. He then wanted to know if I was taking a ranch there; and I told him that I had, and he told me then that that was his land; he says, 'You have got your lumber on my land,' but he said that if I would move over north of the meander line, that he didn't claim that and that it was all right, but that land where this lumber was he claimed as his."

Also on further examination the same witness on direct was asked the following question:

"Q. What did he do with those, if anything?" (meaning plaintiff's maps that French had with him at the time).

Here counsel for plaintiff interposed the same objection as before, and the court thereupon made the same ruling, overruling the objection and permitting the witness to testify to said conversation; to which ruling plaintiff's counsel then and there duly excepted, and said exception was then and there duly allowed and recorded.

Also the following question was asked:

"Q. Well tell the jury whether you would have gone over there if you hadn't had that conversation with him?"

To which plaintiff's counsel interposed the same objection as last above, whereupon the court made the same ruling, overruling the objection and permitting the witness to testify. To which ruling plaintiff's counsel then and there duly excepted, and which
31 exception was then and there duly allowed and recorded.

To which question witness answered, "No, sir."

Whereupon the following question was put:

"Q. What would you have done about locating on the place

where your lumber was and building your house there if you had not met him?"

To which plaintiff's counsel interposed the same objection as last above; whereupon the court made the same ruling, overruling the objection, and permitting the witness to testify.

To which ruling plaintiff's counsel then and there duly excepted, and said exception was then and there duly allowed and recorded. The witness having answered "I would have built there," was asked the following question:

"Q. Would you have built your house and gone to living there?

A. Yes sir.

Q. But because of what Mr. French told you you moved to where you now are?"

To which plaintiff's counsel interposed the same objection as last above; whereupon the court made the same ruling, overruling the objection and permitting the defendant to answer; to which ruling plaintiff then and there duly excepted, and said exception was then and there duly allowed and recorded.

The witness answering the question objected to,

"A. Yes sir."

10. The same witness, to wit, the defendant, being on the stand upon defendant's case-in-chief, upon further direct examination by his counsel, testifying to the conversation between Mr. French and himself when he first went on the land in dispute, was asked by his counsel to tell "us all that was said there at the time as near as you can remember."

When the question, and any conversation between Mr. French and the defendant at that time, 1888, was objected to by the plaintiff's counsel as incompetent, irrelevant, and immaterial; whereupon the objection was overruled by the court, and the question was put and the conversation admitted as follows, to wit:

32 "He told me that if I hauled posts there for fencing, to haul good ones, that he didn't want to buy splinters."

To which ruling plaintiff's counsel then and there duly excepted, and which exception was then and there duly allowed and recorded.

11. The same witness being on the stand, to wit, the defendant in this case, in defendant's case-in-chief, on further direct examination by his counsel, having testified to having received a letter from French, was asked:

"Q. Up to the time when you got this last epistle, did you know he made any claim to that land you occupy there?"

To which question plaintiff's counsel then and there objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled; to which ruling plaintiff's counsel then and there duly excepted, and the said exception was then and there duly allowed and recorded. The witness answering, "No sir, that is the first I ever knew he claimed it."

12. The same witness being on the stand, to wit, the defendant, on defendant's case-in-chief on further direct examination by his counsel was asked the following

"Q. Have you any improvements on your place there?"
To which he answered, "Yes, sir;" whereupon he was asked

"What does it consist of?"

To which last question plaintiff's counsel objected as incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, permitting the question to be put, and the witness to answer as follows:

"A. I have a house there and some corrals and some fencing; I have the place fenced; that is, Mr. French's fence encloses the place on the south side."

To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

13. After both parties had closed their testimony and after argument of counsel, the court instructed the jury among other things, as follows:

33 "I instruct you, gentlemen of the jury, that the plaintiff in this case must succeed, if at all, upon the strength of his own title to the lands described in the complaint; and it devolves upon the plaintiff to convince you by a preponderance of the evidence that it is the actual owner of all the land described in the complaint; and unless you are so convinced, you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

14. Whereupon the court further instructed the jury as follows:

"I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 2 in section 35, township 26 south, range 31 E. W. M., is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining the said lots; and if there was not such lake, you will find for the defendant."

To which instruction plaintiff's counsel duly excepted and said exception was then and there duly allowed and recorded.

15. The court having also instructed the jury as follows:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M.; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant; in other words, it is a fact for you to determine whether or not there was a lake."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

16. The court also instructed the jury as follows:

"The evidence in this case shows that plaintiff was the owner of lots 3 and 4 in section 34, and 1 and 2 in section 35, town-
34 ship 26 south, range 31 E. W. M., in this county. This is not the property described in the complaint in this case; but the plaintiff claims that by reason of the ownership of this property, it also claim- the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for plaintiff to recover in this action it must be shown by a preponderance of the evidence that on or about the 12th day of March, 1860, the said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

17. The court also instructed the jury as follows:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M., bordered on the meander line. You must also be satisfied from a preponderance of the evidence that the waters have receded and left the lots described in the complaint here in dispute as accretions to said lands, or from which the waters have permanently receded so as to leave them in the condition they are now."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

Done and dated this 12th day of November, 1897, at Burns, Oregon.

THORNTON WILLIAMS AND
CHAS. W. PARRISH,
Attorneys for Plaintiff.

35 STATE OF OREGON, } ss:
County of Harney, }

I, A. J. McKinnon, sheriff of Harney county, State of Oregon do hereby certify that on the thirteenth day of November, A. D. 1897, I served the foregoing notice of appeal on the defendant Alva Springer therein named by, within said county, delivering to the said Alva Springer in person a true copy thereof duly certified to by me as such sheriff and I further certify that neither of said defendant's attorneys in said action are residents of or now within said county.

Dated Nov. 13, 1897.

A. J. McKINNON,
Sheriff of Harney County, State of Ore.

36 And afterwards on the 29th day of November, 1897, there was filed in the office of said clerk, a notice of appeal, as follows:

In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK COMPANY, a Corporation, Plaintiff,
vs.
ALVA SPRINGER, Defendant.
} Notice of Appeal.

To Alva Springer, defendant, and Lionel R. Webster and John Cummings, his attorneys:

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of Oregon, from the judgment in said action made and entered in said circuit court on the 31st day of May, 1897, in favor of the defendant in this action, and against the plaintiff; which judgment is in words and figures following, to wit:

Comes now the plaintiff by C. W. Parrish, Thornton Williams, and Waters & Gowan, its attorneys, and comes also the defendant by L. R. Webster and John Cummins, Esq., as his attorneys, and comes on to be heard the motion for a new trial in this case; and the court having duly considered the matter, and being fully advised in the premises now overrules and denies said motion; and now said defendant by his attorneys aforesaid moves the court for judgment on the verdict of the jury heretofore rendered in his favor herein, and for judgment against said plaintiff for his costs and disbursements herein; and the court being fully advised in the premises, it is now ordered and adjudged that the defendant herein do have and recover of and from the plaintiff his costs and disbursements herein taxed at $— and costs.

(Signed) MORTON D. CLIFFORD,
Circuit Judge.

from said judgment and the whole thereof.

37 You will further take notice that upon said appeal said plaintiff and appellant will rely upon the following assignments of error, to wit:

The exception taken and allowed on said trial wherein the defendant having entered upon his case-in-chief, and having among others called as a witness in his behalf one R. HUGHET, who having testified that he had attempted to locate a certain tract of land in section 3, township 27, lying south of the meander line of Malheur lake, on which was the sod-house, was asked by defendant's counsel the following question:

Q. "State whether after that you had any conversation with Mr. French in respect to that?"

Whereupon plaintiff's counsel objected as incompetent, irrelevant, and immaterial; the conversation called for not being in respect to

the land involved in the answer, but some other tract of land; said objection having been then and there sustained by the court, the counsel for defendant asked that what he expected the witness would have answered to said question so ruled out, be shown in the record, to which plaintiff's counsel then and there objected, whereupon defendant's counsel proceeded to state in the hearing of the jury what the answer of the witness would have been had he been allowed to answer; when he was interrupted by counsel for plaintiff, who then and there objected to defendant's counsel stating to the jury what he expected to prove by the witness Hughet, and to the court's allowing him to do so, which objection the court then and there overruled, and allowed counsel to state, in the hearing of the jury, what he expected to prove and show by the answer of the witness in this case, to wit, that he heard Mr. French say that he didn't claim any of the lands north of the meander line; that it was all unsurveyed land, and he made no claim to it.

To which ruling, and the overruling of said objection, and allowing defendant's counsel to make such statement in the hearing of the jury, plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

38 2. G. MARSHALL, also a witness in behalf of defendant, having been called, and having testified about his having land east of the defendant's land in section 36, on which he, the witness, had raised some grain in 1891, 1892 and 1893, was asked the following question:

Q. "How much land did you put into grain?"

Whereupon plaintiff's counsel objected as incompetent, irrelevant, and immaterial; which objection the court then and there overruled, and allowed the question to be put to the witness, and the witness to answer the same, which he did in the following words.

A. "I had about three acres there first."

To which ruling of the court plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

3. The same witness being on the witness stand, to wit, said G. MARSHALL, was asked the following question

Q. "And how far are you from Alva Springer place in dispute here?"

To which he answered: "About a mile."

Plaintiff's counsel objected to said question and answer upon the ground that it was incompetent, irrelevant, and immaterial which objection the court thereupon overruled. To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

4. The same witness being on the witness stand, to wit, said G. MARSHALL, was asked the following question:

Q. "About how much land did you have in grain there?"

To which he answered, "About three acres." Whereupon he was asked by defendant's counsel,

Q. "What kind of grain?"

To which last question plaintiff's counsel objected upon the same grounds as before, to wit, incompetent, irrelevant, and immaterial; which objection the court then and there overruled, allowing the question to be put, and the witness to answer, which he did in the following words:

"A. Wheat, barley, and rye."

39 To which ruling plaintiff's counsel duly excepted, and said exception was duly allowed and recorded.

5. The same witness being on the witness stand, to wit, the said G. MARSHALL, was asked the following question:

Q. "About how much land did he (meaning Rinehart) ever cultivate there?"

(He, the said witness having testified that Mr. Rinehart had a claim about a mile north of the witness's land.)

To which question plaintiff's counsel objected as incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, and permitted the question to be put, and the witness to answer, which he did as follows:

A. "Well, towards the last I think he had about five acres; he didn't have so much the first year."

To which ruling plaintiff's counsel duly excepted and said exception was then and there duly allowed and recorded.

6. L. B. SPRINGER, having been called as a witness on behalf of defendant, was asked the following question:

Q. "Now state, Mr. Springer, whether you have ever raised any garden on your place there in the spring?"

To which question plaintiff's counsel objected *to* as incompetent, irrelevant, and immaterial. Which objection the court then and there *thereupon* overruled, permitting the question to be put, and the witness to answer, which he did as follows:

A. "Yes sir, I have raised garden on my place and his too."

To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

7. The same witness being on the stand, to wit, L. B. SPRINGER, was asked the following question:

Q. "State whether or not there are any gardens raised on any of those places north of the meander line."

Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and no foundation laid. Whereupon the question was withdrawn, and the following question put:

40 Q. "Upon the land north of the meander line and west of Alva Springer's the defendant's place, are there any raised?"

To which question plaintiff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, and permitted the question to be put and the witness to answer as follows:

A. "Yes sir."

To which ruling plaintiff's counsel then and there duly excepted and said exception was then and there duly allowed and recorded.

8. THOMAS JONES having been called as a witness for the defendant was asked as follows:

Q. "You are the register of the land office here, are you not, Mr. Jones?

A. Yes sir.

Q. What is that you have in your hand sir?

A. Our official plat of township 25 south, range 32 east.

Q. On file in your office?

A. Yes sir."

A certified copy of same is here offered in evidence by the defendant, the same showing the meander line.

To the introduction of which plaintiff objects as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, and permitted the same to be introduced in evidence, shown to the jury and marked Exhibit "2" defendant's proof.

To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

9. The defendant having called ALVA SPRINGER in his own behalf, was examined by defendant's counsel as follows:

Q. Where do you live, Mr. Springer?

A. I live near the sod-house, near the mouth of Blitzen river.

Q. In this county and State?

A. Yes sir.

Q. You are the defendant in this case, I believe?

A. Yes sir.

Q. Are you a married man?

A. Yes sir.

Q. Have you a family?

A. Yes sir, a wife and two children.

41 Q. And you live there on this land in controversy as your home, do you?

A. Yes sir.

Q. When did you first come there?

A. I went there in July 1888.

Q. Did you see Mr. French when you first went there?
A. No sir, I seen him a few days before I went there.
Q. I mean when did you first come to that part of the country?
A. In June, 1888, was the first time.
Q. Where did you go when you first went there, what part or particular portion of land there in that vicinity did you go on?
A. I went to a piece of land south of this.
Q. About how far south of where you are now?
A. Well, south and east something over a quarter of a mile; between that and a half a mile.
Q. Did you see Mr. French when you first went there on that land?
A. No sir, not at that time.
Q. Where did you go after having gone there on that land, what do you mean by "going on that piece of land;" what did you do with it?
A. I located the piece of land there, and put some lumber on that.
Q. For what purpose?
A. I calculated to locate there.
Q. What did you put the lumber there for?
A. For a house.
Q. After that where did you go?
A. Back to Harney.
Q. For what purpose?
A. To get some more lumber and my family.
Q. What did you do when you got to Harney?
A. I went to the saw-mill and got some more lumber, and started back down there.
Q. With your family?
A. Yes sir.
Q. When did you see Mr. French then?
A. I met Mr. French there near the sod-house as I went back.
Q. Did you know him at that time?
A. By sight, yes sir.
Q. Did you have any conversation with him there?
A. I met Mr. French right on this side of Saddle Butte something like a mile or so; my wife was driving the team and I was driving some milk cows. I was off to the side of the road a little ways, and Mr. French was in a cart I think, anyway he was in a rig
42 of some kind; and he drove out to where I was and asked me if I was the man——

Here witness was interrupted by counsel for plaintiff who here objects to any statement of any conversation between this defendant and Mr. French as incompetent, irrelevant, and immaterial, hearsay, and not the best evidence.

Which objection the court thereupon overruled and permitted the witness to continue.

To which ruling plaintiff's counsel then and there duly excepted, and the said exception was then and there duly allowed and recorded; and witness continued as follows. "And he asked me if I

was the man that had some lumber down west of the sod-house; I told him that I was. He then wanted to know if I was taking a ranch there; and I told him that I had, and he told me then that that was his land; he says, 'You have got your lumber on my land,' but he said that if I would move over north of the meander line, that he didn't claim that and that it was all right, but that land where this lumber was he claimed as his."

Also on further examination, the same witness on direct, was asked the following question:

Q. "What did you do with those, if anything?" (meaning plaintiff's maps that French had with him at the time)

Here counsel for plaintiff interposed the same objection as before, and the court thereupon made the same ruling, overruling the objection and permitting the witness to testify to said conversation. To which ruling plaintiff's counsel then and there duly excepted and said exception was duly allowed and recorded.

Also the following question was asked:

Q. "Well, tell the jury whether you would have gone over there if you hadn't had that conversation with him?"

To which plaintiff's counsel interposed the same objection as last above; whereupon the court made the same ruling, overruling the objection and permitting the witness to testify. To which ruling plaintiff's counsel then and there duly excepted, and which exception was then and there duly allowed and recorded.

43 To which question witness answered, "No sir."

Whereupon the following question was put:

Q. "What would you have done about locating on the place where your lumber was and building your house there if you had not met him?"

To which plaintiff's counsel interposed the same objection as last above; whereupon the court made the same ruling, overruling the objection, and permitting the witness to testify.

To which ruling plaintiff's counsel then and there duly excepted and said exception was then and there duly allowed and recorded. The witness having answered "I would have built there;" was asked the following question:

Q. "Would you have built your house and gone to living there?

A. Yes sir.

Q. But because of what Mr. French told you you moved to where you now are?"

To which plaintiff's counsel interposed the same objection as last above, whereupon the court made the same ruling, overruling the objection and permitting the defendant to answer. To which ruling plaintiff then and there duly excepted, and said exception was then and there duly allowed and recorded.

The witness answering the question objected to, "Yes sir."

10. The same witness, to wit, the defendant, being on the stand, upon defendant's case-in-chief upon further direct examination by his counsel, testifying to the conversation between Mr. French and himself when he first went on the land in dispute, was asked by his counsel to "tell us all that was said there at that time as near as you can remember." When the question, and any conversation between Mr. French and the defendant at that time, 1888, was objected to by the plaintiff's counsel as incompetent, irrelevant, and immaterial, whereupon the objection was overruled by the court, and the question was put and the conversation admitted as follows, to wit:

"He told me that if I hauled posts there for fencing, to haul good ones, that he didn't want to buy splinters."

44 To which ruling plaintiff's counsel then and there duly excepted, and which exception was then and there duly allowed and recorded.

11. The same witness being on the stand, to wit, the defendant in this case, in defendant's case-in-chief, on further direct examination by his counsel having testified to having received a letter from French, was asked:

Q. "Up to the time when you got this last epistle, did you know he made any claim to that land you occupy there?"

To which question plaintiff's counsel then and there objected as incompetent, irrelevant, and immaterial. Which objection the court thereupon overruled. To which ruling plaintiff's counsel then and there duly excepted and the said exception was then and there duly allowed and recorded. The witness answering, "No sir. That is the first I ever knew he claimed it."

12. The same witness being on the stand, to wit, the defendant, on defendant's case-in-chief, on further direct examination by his counsel, was asked the following:

Q. "Have you any improvements on your place there?"

To which he answered, "Yes sir." Whereupon he was asked:

Q. "What does it consist of?"

To which last question plaintiff's counsel objected as incompetent, irrelevant, and immaterial; which objection the court thereupon overruled, permitting the question to be put and the witness to answer as follows:

A. "I have a house there and some corrals and some fencing; I have the place fenced; that is Mr. French's fence incloses the place on the south side."

To which ruling plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

13. After both parties had closed their testimony, and after argument of counsel, the court instructed the jury among other things as follows:

45 "I instruct you, gentlemen of the jury, that the plaintiff in this case must succeed, if at all, upon the strength of his own title to the lands described in the complaint; and it devolves upon the plaintiff to convince you by a preponderance of the evidence that it is the actual owner of all the lands described in the complaint, and unless you are so convinced, you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

14. Whereupon the court further instructed the jury as follows:

"I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M., is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there is in reality a lake north of and adjoining the said lots; and if there was not such lake, you will find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

15. The court having also instructed the jury as follows: "I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 E. W. M.; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant; in other words, it is a fact for you to determine whether or not there was a lake."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

16. The court also instructed the jury as follows:

"The evidence in this case shows that plaintiff was the owner of lots 3 and 4 in section 34, and 1 and 2 in section 35, town-
46 ship 26 south, range 31 E. W. M., in said county. This is not the property described in the complaint in this case; but the plaintiff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for plaintiff to recover in this action it must be shown by a preponderance of the evidence that on or about the 12th day of March, 1860, the said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

17. The court also instructed the jury as follows:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26

south, range 31 E. W. M., bordered on the meander line. You must also be satisfied from a preponderance of the evidence that the waters have receded and left the lots described in the complaint here in dispute as accretions to said lands, or from which the waters have permanently receded so as to leave them in the condition they are now."

To which instruction plaintiff's counsel duly excepted, and said exception was then and there duly allowed and recorded.

18. The jury on said trial having rendered their verdict in favor of the defendant, and against the plaintiff; the plaintiff within one day after the rendition of said verdict filed its motion to set aside said verdict, and for a new trial; specifying therein as grounds thereof,

1. Insufficiency of the evidence to justify the verdict, and that the same is against law, and

2. Errors in law occurring at the trial and excepted to by the plaintiff.

And thereupon the court overruled said motion and gave
47 judgment on said verdict against plaintiff; all of which was duly entered on the journals of said court, and there appears of record all of which ruling was error.

Done and dated this 19th day of November, A. D. 1897, at Canyon City Oregon.

T. WILLIAMS AND
CHAS. W. PARRISH,
Atty's for Plaintiff.

STATE OF OREGON, } ss:
County of Harney, }

I, A. J. McKinnon sheriff of Harney county, Oregon, do hereby certify that on the 27th day of November, A. D. 1897, I served the foregoing notice of appeal on the defendant, Alva Springer therein named by within said county, delivering to the said Alva Springer in person, a true copy thereof duly certified to by me as such sheriff, and I further certify that neither of said defendant's attorneys in said action are residents of or now within said county.

Dated November 29th A. D. 1897.

A. J. McKINNON,
Sheriff of Harney County, State of Oregon,
By S. W. MILLER, *Deputy.*

48 In the Circuit Court of the State of Oregon for the County of Harney.

THE FRENCH-GLENN LIVE STOCK COMPANY, a Corporation, Plaintiff and Appellant,
vs.
ALVA SPRINGER, Defendant and Respondent.

STATE OF OREGON, *County of Harney*, } *ss*:

I, H. Kelley, county clerk and *ex officio* clerk of the circuit court of the State of Oregon, for the county of Harney, do hereby certify that on the 16th day of November, 1898, The French-Glenn Live Stock Company, the plaintiff and appellant in the above-entitled cause, filed an undertaking on appeal for the costs and disbursements of said action, with Leon M. Brown and I. S. Geer as sureties therein conditioned that the said appellant will pay all damages, costs, and disbursements which may be awarded against appellant on the appeal. And I further certify that said undertaking is given for an appeal and a stay of proceedings also.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 12th day of April A. D. 1898.

H. KELLEY, *Clerk*,
By C. A. GILHAM, *Deputy*.

[Circuit Court Seal.]

49&50 In the Circuit Court of the State of Oregon for the County of Harney.

STATE OF OREGON, *County of Harney*, } *ss*:

I, H. Kelley, county clerk and *ex-officio* clerk of the circuit court of the State of Oregon, for the county of Harney, do hereby certify that the foregoing copies of pleadings, papers, orders, and journal entries constituting the judgment-roll, together with the notice of appeal in the case of The French-Glenn Live Stock Company, a corporation, plaintiff and appellant *vs.* Alva Springer, defendant and respondent, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original pleadings, papers, orders, journal entries and notice of appeal and of the whole thereof, as the same appear of record and on file at my office and in my custody.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court the 12th day of April, A. D. 1898.

H. KELLY, *Clerk*,
By C. A. GILHAM, *Deputy*.

[Circuit Court Seal.]

51 In the Circuit Court of the State of Oregon for Harney County.

THE FRENCH-GLENN LIVE STOCK CO., Pl'ff,
vs.
ALVA SPRINGER, Def't.
} Bill of Exceptions.

Comes now the pl'ff and presents and files this its bill of exceptions herein, to wit:

That at the May term of the above-entitled court in the year 1897, begun and held in and for said Harney county at Burns the county-seat therein, when on the 24th and subsequent days of May in said year,

Upon the trial of the above-entitled cause before Hon. M. D. Clifford and a jury called and empanelled to try the same.

The following exceptions were duly taken allowed and recorded, as appears by the reporter's transcript of the evidence in said cause, all of which evidence is hereunto annexed for more particularity, and made part hereof, and marked "Transcript of evidence in case of French-Glenn Live Stock Company *vs.* Alva Springer."

And Chas. W. Parrish and Thornton Williams of counsel appearing for the pl'ff herein, and L. R. Webster and John Cummins of counsel appearing for the def't and the pl'ff's counsel aforesaid, to maintain the issues on the part of the pl'ff and in support thereof having introduced in evidence a plat, the same being a certified copy of the official plat of township No. 26 south, range No. 31 E. of the Willamette meridian, "south of Malheur lake," on file in the United States surveyor general's office, Portland, Oregon; the same being certified by John C. Arnold, surveyor general for Oregon, which certified plat having been shown to the jury, was marked and filed as Exhibit "A" pl'ff's proofs, and made part of the record herein and is hereto attached and made also part hereof. Also a certified copy of a deed from the State of Oregon to William Allen, his heirs and assigns, for the following-described swamp lands situate in Harney county, Oregon, to wit:

52 lots 2, 3, 4, and 5 of section 32, lots 3 and 4 of section 33 and lots 1, 2, and 3 of section 34, township 26 south, range No. 31 E. of the Willamette meridian containing 251.38 acres; said lots 1, 2, and 3 in section 34 being the three lots just south of the lands occupied by the def't Alva Springer, which, duly certified, was received in evidence, and having been read to the jury was marked and filed as Exhibit "B" pl'ff's proofs and made part of the record herein, and is hereto attached and made part of the bill of exceptions. Also a copy of record of deed from the State of Oregon to C. E. Preston of, among other lands, the tracts lots 4 in section 34 and lots 1 and 2 in section 35, township 26 south range No. 31 E. Willamette meridian, said copy being duly certified by the county clerk of Harney county, the official keeper of said records, and which, having been received in evidence and read to the jury was marked and filed as Exhibit "D" pl'ff's proofs, and made part of the record herein, and also annexed and made part hereof.

Also a certified copy of a deed from William Allen to Peter French

for the same lands described in Exhibit "B" pl'ff's proofs which duly certified was received and having been read to the jury was marked and filed as Exhibit "C" pl'ff's proofs and made part of the record herein, and also annexed and made part hereof.

Also a copy of record of deed from C. E. Preston to Peter French for the same lands described in Exhibit "D" pl'ff's proofs which duly certified was received and having been read to the jury was marked and filed as Exhibit "E" pl'ff's proofs and made part of the record herein, and is also attached and made part hereof.

Also the deed of Peter French to The French-Glen Live Stock Company, the pl'ff in this action, for lots 1, 2, 3, 4, 5 and 6 of section 32; lots 1, 2, 3, and 4 of section 33; lots 1, 2, 3, and 4 of section 34, and lots 1 and 2 of section 35, all in township 26 south, range No. 31 E. Willamette meridian, the same embracing the lots lying just south of the lots occupied by the def't in this action, which deed, duly authenticated was received in evidence and having been read to
53 the jury was marked and filed as Exhibit "F" pl'ff's proofs and made part of the record herein, and also attached to and made part of this bill of exceptions.

Also a certified copy of the field-notes of the meanders of the south shore of Malheur lake through fractional township 26 south, range No. 31 E. Willamette meridian, the same being certified to Sept. 16th, 1895 by the United States surveyor general for Oregon, which having been received in evidence and showed to the jury, was marked and filed as Exhibit "G" pl'ff's proofs, and made part of the record herein, and also attached hereto and made part hereof.

Also having called as a witness THOS. JONES, register of the United States land office at Burns, Oregon, and shown that he had in his care among the records of said office, a plat of survey of fractional township 26 south, range No. 31 E. Willamette meridian, south of Malheur lake, which plat had been filed in the local land office in the year 1877, the same was produced and offered in evidence and having been received and shown to the jury was explained by the witness, and the date the same bears filing in the district which then included this district shown to be Sept. 17, 1877, and was marked and filed as Exhibit "H" pl'ff's proofs and made part of the record herein, and is also attached hereto and made part hereof.

Also certified copies of patents of the United States to the State of Oregon for lots 3 and 4 in section 34, and lots 1 and 2 in sections 35 of the same township shown by the plat Exhibit "H" pl'ff's proofs last introduced; which, certified, by the secretary of state, and by the clerk of the board of school land commissioners of the State of Oregon, were received and having been read to the jury were marked and filed as Exhibit "I" pl'ff's proofs and made part of the record herein, and also attached and made part hereof.

Also having called as a witness in said behalf PETER FRENCH and shown by said witness that he is and ever since the early part of Jan'y 1894 was the president and manager of the pl'ff corporation, having

the exclusive management and control of all its property in the
54 State of Oregon; that said corporation was organized in the early part of Jan. 1894 and that he the said witness had had personal acquaintance with the land in dispute in this cause for many years, and that the margin of the lake has receded since the said survey in 1877, leaving between the said meander line and subsequent margin of the water the land in dispute and other land, the south line of the lake being some seasons at least a mile further north now than then, and that the same was principally caused by the breaking away of the sand reef or ridge between Malheur lake and Harney lake, beginning in 1881 or 1882, whereby a deep gap was made which let the waters of Malheur lake out of their bed into that of Harney lake; that prior to 1881 or 1882 the said sand reef or ridge formed a complete barrier between the two lakes and dammed the waters of Malheur lake up in their own bed, so as to hold them therein, the waters of Harney lake being very much lower than the waters of Malheur lake, the latter lapping up against the edge of the sand reef or sand knoll, so that one could hardly pass along on the Malheur side horseback, while on the Harney Lake side there was a hard beach level that was from 250 to 300 yards down to the waters, the beach being perfectly hard and level, in the judgment of said witness the surface of the water of Harney lake was while said barrier continued, 10 feet or more lower than the surface of the water in Malheur lake; that by reason of the running off of the waters of Malheur lake through said gap in the sand reef, since 1881 or 1882 Malheur lake has become partially drained; that witness, on the day prior to the day he gave such testimony had measured said gap that the width he could not get, but he thought a strong 100 feet; it looked more than that to him; the depth he got as well as he could; he had an eight-feet pole; 8 ft. and 2 in. and he couldn't get bottom anywhere with that; he waded out into the stream up to the armpits with the pole and tried to get bottom with it and couldn't and swam out with the pole 20 or 30 feet and found the current setting from Malheur lake to Harney lake too strong to handle the pole, in his judgment it is 15 to 18 feet deep in the center; that witness from the year 1873 up to the year 1881 bought and handled a great many cattle in that country and drove nearly all of them
55 across said sand reef for years and years, was very well acquainted with the margins of Malheur lake from the lands in dispute in this cause down to the said sand reef; it was the way they drove stock; and there was no way or place to cross the lake between said lands and the sand reef only sometimes on the ice in the winter; that the land in dispute in this action, to wit, beginning at the northeast corner of lot 2 in section 35 township 26 south range No. 31 E. Willamette meridian south of Malheur lake in said Harney county, State of Oregon, as appears on the map of survey of the said township in the office of the register and receiver of the U. S. land office at Burns, Oregon, running from said point north one-quarter of a mile or thereabout; thence west one mile or thereabout; thence south one-quarter of a mile or thereabout, to the point of the

fence enclosing said premises at or near the northwest corner of lots 3 of section 34 in said above-mentioned township and range, east of said meridian and south of said lake in said county and State aforesaid; thence easterly following the meander line of said lake as shown by and upon said map to the place of beginning, adjoining lots 1, 2, and 3 in section 34 said township and range on north, was formerly covered with water all the year round until the breaking away of the sand barrier between the lakes; that that breaking away of said barrier had the effect of taking the water away from said land and making the said land more dry. Half probably two-thirds of the water formerly covering these and adjacent lands go further west and do not reach that section of country at all; that witness has seen def't upon said lands that he has placed thereupon the tract described in the complaint a small lumber house about 12 x 16 with shingle roof, a little lean-to for a kitchen and some posts in the ground with poles on top for a shed without any covering now; a small correl with probably 50 poles in it; about a mile and a quarter of 3-wire fence with posts about 30 or 35 feet apart with no stays and painted wire, that def't since January 1, 1894 when pl'ff became the owner of such lands, def't has occupied and still occupies them; that he pastures stock there and has cut the
56 hay; depriving pl'ff entirely of possession of the whole of said tract of land; that the feed has been used up and the ground badly trampled; last season it was eaten down to the ground, some portions of it; that such land is reasonably worth 50 cts. an acre; and that possession has been demanded by the pl'ff of the def't and refused.

Also this witness having been asked on cross-examination about a fence prior to 1888 about said tract of land, it was shown by him on redirect examination, that after the def't and his party came there in 1888, witness, then owner of a field up above there for the purpose of protecting said field from stock going through, ran a fence through on the north as nearly on the meander line as they could to save the feed for the winter, that Malheur lake was not a navigable lake in 1877; and had no outlet. The Dunder & Blitzen flowed into it from the south and the Silver river from the north. The Dunder & Blitzen made up of the waters of Keyger creek, Cocomunga creek and other small creeks which flow into it; neither was there any outlet to Harney lake.

Also having called as a witness in behalf of pl'ff Mr. THOMAS ALLEN, who testified to having been across the sand reef or bar between the two lakes, Malheur and Harney in the year 1879, at which time the witness brought cattle into Harney valley across that reef or bar; was never in the employ of pl'ff or of French or Glenn or any of their associates; that in 1879 there was no channel or gap through the sand reef; Malheur lake was then the highest water; the break occurred about 1881; when first saw the break it was about 50 to 70 feet wide in his judgment but he did not measure it; was with a party going from the Blitzen river with cattle and camped at Hot springs south of Harney lake; had heard it

had broken through and went to look at it through curiosity and found the water flowing through the break from Malheur lake into Harney lake, from the east to the west.

Also having called as a witness in behalf of pl'ff Mr. John I. NEWMAN who testified to a first acquaintance with Malheur lake in 1878; first saw the sand reef between Malheur and Harney
57 lakes in the spring of said year, on an occasion when there riding after cattle; didn't cross it at that time; saw cattle on it then; crossed it in the fall of the same year. There was no channel or cut through it then; Malheur lake was the highest, there was 8 or 10 feet difference in the levels should judge; crossed over also in the fall of 1881; there was no cut then; first saw the cut between '81 and '85 couldn't say what date it was; found it was cut through; should judge the channel to be about 16 feet wide; there was water running through from Malheur lake into Harney lake; from 1885 down to 1894 Malheur lake receded from its old original boundaries prior to the break in the sand reef, a good ways back from the old lake line.

Also having called as a witness in behalf of pl'ff Mr. WALTER PARKER, who testified to having settled in Harney valley in 1880 and being here ever since; knowing the sand reef between Malheur and Harney lakes; crossed that sand reef first in May 1881; camped on it on the 2d of May; and went clear across from side to side; the water had just broke over it at the time; there was a very small cut; could step across it, about 6 or 8 inches deep, camped right on the stream; next saw it in June 1882, thought it was about 60 or 70 feet wide at that time; didn't know how deep; it was about 50 yards probably across the main ridge through which it cut, and the waters were flowing from Malheur lake into Harney lake. Harney lake was the lowest, somewhere from eight to twelve feet difference in the altitude of the waters of the two lakes when first saw the sand reef, and on redirect examination the same witness testified that there were sand domes there where the cut ran through upon the main reef; and where the water cut through some of these sand domes or banks, there were places deeper from the top of the water; and in other places where there were no sand domes, it is not so far; that the water was running pretty rapidly, but didn't seem to pour over or fall over; it was a gradual slope down; have not been in French's employ; never had any business relations with him, or with any of the French-Glenn Live Stock Company.

Also having called as a witness in behalf of pl'ff Mr. MART BUENTON, who testified that he resided in Burns, Oregon; engaged
58 in the livery and feed stable business there; had been in the employ of Mr. French, but it had been about six years since he left such employ; first came to Harney valley in 1881; along in the early part of the season; was then in the employ of Mr. Thos. Potter; stopped at his place for first residence in Harney valley seven or eight miles from Burns; was at the sand reef that

year was herding a bunch of mares, and four head strayed away and witness went to look for them; tracked them toward Malheur lake onto the sand reef and followed them out onto the sand reef for quite a distance until he came to the channel where it was broken over from Malheur lake into Harney lake; didn't go on over, but came back to the ranch; that was in April, 1881, there was a cut there; it wasn't over, don't think 3 or 4 foot wide and it looked like it was about 18 or 20 inches deep; didn't measure it; it looked as if it hadn't been broken over very long; might have broken over some time in the night before; the waters of Malheur lake were running through it into those of Harney lake; Malheur lake was quite a lot higher than Harney lake; looked as if there was about 15 or 20 feet difference from the sand reef; the sand reef was pretty high; Harney lake was away down quite a lot lower than the Malheur lake where this water was running through, it run off sloping and this water was running over the top; the cut wasn't over about 3 or 4 feet wide don't think and don't know exactly how deep it was, it wasn't very deep though, next time witness saw it was about 3 or 4 years ago, was then all washed out deep, there is a very deep channel through there now. It was dry when witness was there in the fall of the year; channel or cut about 30 or 40 feet wide probably wider, couldn't say exactly; witness worked for French about three or four years over there in that Blitzen country; was at the sod-house during one season in haying, about four or five or six years ago, somewheres along there, don't remember exactly what year it was; in the fall of 1881 witness left here (about Burns meaning) and went over there to gather cattle; we went from Harney to Anderson valley and from there to another valley; and then crossed over to Diamond and down across the lava beds to the Rock ford and from there to the
59 sod-house; and camped there at those springs. In going from Rock ford you go almost directly north, right down the Blitzen river on the east side. Malheur lake has receded rapidly ever since witness saw it four or five years ago. Witness has traveled round the lake on the north side to Saddle Butte; there it appears to have run down rapidly; when witness was there in 1881 we had to cross at what they call the "Slough house," near where the bridge is now, and since that we cross up to the right near what is called "Saddle Butte" to the lake, on account of the water in the lake between the lake and Saddle Butte. At that time, in 1881, the water extended up to Saddle Butte so that it kept that slough so full of water that nobody could cross it, the small slough there at the "Slough house," near the bridge.

And on cross-examination this witness was asked if he knew where Alva Springer's house now is, to which he answered that he had seen it, and on being further questioned on cross-examination stated that it looked to him at that time, 1881, as if the water was all over there, the ground where def't's house now stands. Being then asked if it was all open water, or was it tulies, answered it was tulies mostly, yes, sir. Being further asked, this witness said, "I swam across this little branch that night to get some grass to keep

from guarding." Being asked if that was on the Springer (def't's) ranch there, he said, "I don't know whether it was on the ranch there or not." Being asked if he didn't herd the horses right there where Springer's (def't's) place is? he said, "No, sir, I didn't at that time; I don't believe that a man could have got in there where his house is (def't's house meaning) without having considerable trouble in getting through the mud and water."

And on redirect examination, in answer to questions this witness further testified: Originally when witness first came to this country, it was all called Malheur lake from this body of water which extended down to the sand reef; right where Mr. French's hay corral now stands is that little knoll where witness swam the horses across; it was a very small place; it looked like about 3 or 4 acres that was out of the water; swam the horses across to this place for the purpose of keeping from guarding them that night; and there was a little better feed over there than there was on the other side.

Also having called as a witness in behalf of pl'ff Mr. JOHN MCCOY, who testified that he built the fence referred to by Mr. French in his testimony under contract, and that he ran the said fence from the top of the hill the other side of the Blitzen on down *on* to section 36 or what is commonly called or spoken of as the school section, which is situated next east of the spring, and in doing so ran into the waters of the lake, Malheur lake. It was about knee-deep anyhow; ran the fence into the waters of the lake witness should judge about four rods; that was where the east end of the fence stopped, about four rods in the water, witness thinks he put four posts into the water.

Also having called as a witness for the pl'ff Mr. A. BUSSE who testified that he also had a contract with Mr. French to build the fence referred to—about the year 1888—extending down the west side of the Blitzen running out into the lake; commenced there about in April and finished about June or July guesses; there was a place there as far as witness could run then where McCoy lives, and then as far as witness could run it; McCoy lived there at that time; and witness ran the end of this fence just to his place and no further; that was the end of it; he (McCoy) (his place meaning) was in the water there all right enough; it was pretty near all water there at that time; knows Simmons' place; Simmons is about a mile and a quarter further down north; did not turn the fence and run it round any other water; that was north and witness had to quit. It was all water in there; yes, had trouble in building; got as far as could; that was all; too much water there.

Also on cross-examination in answer to questions the same witness testified. There was considerable water; thinks, maybe two or three feet, where he set last post (running north); something like that; asked if he didn't say that Simmons' place is further north (than where he set last post) says "Yes sir; it was right down due north on that line." Asked if they didn't cut hay on Simmons' place that

year says "I guess not." Asked if he don't think they cut
61 hay on Simmons' place that year says "No sir; I don't. I don't believe it." Asked if he thought it was in June says "That I run the fence? In June, yes sir." Asked if later along in the fall there was any water where he set the posts, says "It got dry after that sure enough about then, but not very much; it was very muddy there the whole year round." Asked what year it was says "1885, no, 1886." Asked to figure it out and see which it was 1885 or 1886, says "It would come very close to—say 1886."

Also FRANK MCBEAN called on the part of pl'ff testified that his residence was in Canyon City, Grant county, Oregon, occupation in the livery and feed stable business; witness came to Canyon City in April, 1863; has resided in Harney valley; in the fall of '69 was running the military mail between Canyon City and the old Post Camp Harney; after which he ran the U. S. mail from Canyon City to Camp McDermot in Nevada; for a number of years commencing in 1870 and quitting, he thinks, in the fall of 1880 or 1881; mail route ran past easterly side of Malheur lake; round the head of the lake, close to Windy point and then over into Anderson valley. Has been at the sand reef between Malheur lake and Harney lake; for the first time in the fall of 1872. Crossed the lake at that place at that time between the lakes; thinks it was in December; fore part of winter; might have been January. A. H. Robie was with him at time and a soldier; three of them; they went out on the road, and went on to a point here on the west and struck out on the ice; and struck the sand reef out maybe a mile from the edge of the lake on this side, and then we went along most of the time on the ice until we got on the other side, crossed over the ridge; observed the difference there was between the altitude of the surface waters of the two lakes; talked about it; as we went over; judged the difference was about from 6 to 10 feet. There was no break in the reef those days; none that we saw; we struck out about a mile from the reef, from this end of the lake; off from a bend it might have been two or three miles from where the reef comes out on this side, it was further west of what is commonly called Wright's point; we struck out just catacornered across through the sage
62 brush there thinks about a mile or a mile and a half from the shore and crossed the ice; the lake was frozen over at the time; we then went up the other side of the Donner & Blitzen river and followed up that side to the P. ranch on the west side; we crossed the Donner & Blitzen river right at the P. ranch; don't remember whether just exactly above or below the house; we came down on this side, on the east side down into where we struck the swamp, then we went back up around by what is called now the Diamond ranch, then we crossed over the creek and came on down and crossed over to the Rock ford and came across over the country and went over to the Big springs; we crossed back on the west side and then came back the next day and went over to these Big springs that comes into Malheur lake; has been there also within a day or two; there is considerable difference now, would

not say how many feet; but there was quite a lake there then to what it is now the lands there lying along in front of the mouth of the Blitzen in those days was all under water along there.

And having also called as a witness in behalf of pl'ff PRIM ORTAGE, who testified that he knew the section of country known as the sod-house in 1877; and was also there a few days ago; there is a good deal of difference; there was more water then than now; the water was spread out everywhere then more than it is now; knows the place def't claims; there is a good deal of difference; a good deal more water then than there is now could not get to those places then in the spring of the year; couldn't get to where def't's house is now without bogging down; don't believe there was an acre there but what was covered with water; knows the sand reef between the lakes; was first through there in 1880; might have been across there in 1877; sure he was in 1880; water was pretty well up, but not running through at that time; in 1882 saw it when the water was running through; should judge the cut was 60 or 70 feet wide then, and the water was flowing through it from Malheur lake into Harney lake.

And having recalled Mr. FRENCH who testified that the fence spoken of by the witnesses McCoy and Busse was extended in after McCoy had made it down to the school section on the west
63 side of the ranch Mr. Busse built it and extended it into the water; it extends into the water very near the southeast corner of the section—pretty near there and the fence ran into the deep water to prevent the stock from going around there; and it remained there a good many years. Afterward he had to send down from the ranch and extend both fences further in after this breaking through of the channel between the lakes; sent some men down and extended the fence in a little further, and that was its condition when these people came there and entered in.

Pl'ff thereupon rested its case-in-chief and defendant thereupon duly presented a motion for judgment of nonsuit, which was overruled by the court, and an exception taken to the ruling by the def't as shown on pages 171*a*, 171*b* and 172 of the transcript of the evidence in this case.

Exceptions.

First. Whereupon, the def't having entered upon his case-in-chief, and having among others called as a witness in his behalf one R. HEWITT, who having testified that he had attempted to locate a certain tract of land in section three, in township twenty-seven, lying south of the meander line of Malheur lake on which was the sod-house, was asked by def't's counsel the following question, numbered 53 of the direct examination of said witness as appears on page 330 of the reporter's transcript aforesaid hereunto annexed, marked "A" and made part hereof, to wit:

53 Q. "State whether after that you had any conversation with Mr. French in respect to that?"

Whereupon pl'ff's counsel objected as incompetent, irrelevant, and immaterial, the conversation called for not being with reference to the land involved in this action, but some other tract of land, and said objection having been then and there sustained by the court, counsel for def't asked that what he expected the witness would have answered to the said question so ruled out be shown in the record, to which pl'ff's counsel then and there objected.

64 Whereupon def't's counsel proceeded to state in the hearing of the jury what the answer of the witness would have been, had he been allowed to answer, when he was interrupted by counsel for the pl'ff, who then and there objected to the def't's counsel stating in the presence of the jury what he expected to have proved by the witness Hewitt, and to the court's allowing him to do so.

Which objection the court thereupon overruled and allowed counsel to proceed to state in the hearing of the jury that

"We expect to prove, or to show, by this witness, in answer to this question, that he heard Mr. French say that he didn't claim any of the lands north of the meander line; that it was all unsurveyed land, and he made no claim to it."

To which ruling, overruling the said objection and allowing the def't's counsel to make such statement in the presence and hearing of the jury, the pl'ff's counsel duly excepted, and the exception was then and there duly allowed and recorded as appears on pages 330 and 331 of said transcript.

Second. G. MARSHALL, also a witness in behalf of the def't having been called and examined as a witness by def't's counsel, and having testified to his having land to the east of def't's land in section 36, on which he (witness) had raised some grain in 1891, 1892, and 1893, was asked the following question numbered 132 of the direct examination of said witness upon def't's case-in-chief as appears on page 382 of the said transcript, to wit:

132. Q. "How much land did you put into grain?"

Whereupon pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, and allowed the question to be put and the witness to answer same, which he did in the following words:

A. "I had about 3 acres there, at first."

To which ruling of the court pl'ff's counsel duly excepted,

65 and the said exception was then and there duly allowed and recorded as appears on page 382 of said transcript.

Third. The same witness being on the stand to wit, the said G. MARSHALL, as witness for def't on def't's case-in-chief on further direct examination by def't's counsel was asked as follows:

136. Q. "And how far are you from the Alva Springer place, in dispute here?"

A. "About a mile."

Pl'ff's counsel objected to said question and answer upon the ground it is incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled.

To which ruling pl'ff's counsel duly excepted, and said exception was then and there duly allowed and recorded as appears on page 383 of said transcript.

Fourth. The same witness being on the stand, to wit, the said G. MARSHALL, as witness for def't on def't's case-in-chief upon further direct examination, by def't's counsel, said witness was asked as follows:

137. Q. "About how much land did you have in grain there?"
A. "About 3 acres."
138. *A.* "What kind of grain?"

To which last question the pl'ff's counsel interposed an objection upon the same grounds as before, to wit, incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, allowed the question to be put and the witness to answer, which he did in the following words:

A. "Wheat, barley, and rye."

To which ruling pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded as appears on page 383 of said transcript.

Fifth. The same witness being on the stand to wit, the said G. MARSHALL, as a witness for def't on def't's case-in-chief, upon further direct examination by def't's counsel, said witness having tes-
66 tified that Mr. Rinehart had a claim of land about a mile north of him (witness) was asked:

149. Q. "About how much land did he," (Rinehart meaning) "ever cultivate there?"

To which question pl'ff's counsel objected as incompetent, irrelevant, and immaterial,

Which objection the court thereupon overruled, and permitted the question to be put and the witness to answer, which he did as follows:

Well, toward the last, I think, he had about 5 acres, he didn't have so much the first year.

To which ruling pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded as appears on page 384 of said transcript.

Sixth. L. B. SPRINGER having been called as a witness in behalf of def't upon def't's case-in-chief upon his direct examination by def't's counsel, having testified among other things that he had a place joining the place of def't was asked the following question:

116. Q. "Now, state, Mr. Springer, whether you have ever raised any garden on your place there in the spring?"

To which question pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled and permitted the question to be put and the witness to answer same in the following words:

A. "Yes, sir; I have raised garden on my place, and his, too."

To which ruling pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded as appears on page 420 of said transcript.

Seventh. The same witness being upon the stand, to wit, the said L. B. SPRINGER, as a witness for def't on def't's case-in-chief, upon further direct examination by def't's counsel, the following questions were asked:

153. Q. "State whether there are any gardens raised on any of those places north of the meander line?"

67 Objected to by pl'ff's counsel as incompetent, irrelevant, and immaterial, no foundation laid.

Question withdrawn.

154. Q. "On the lands north of the meander line and west of Alva Springer (def't's) place are there any raised?"

To which question pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled and permitted the question to be put and the witness to answer as follows:

A. "Yes, sir."

To which ruling pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded as appears on page 425 of said transcript.

Eighth. THOS. JONES having been called as a witness for def't upon def't's case-in-chief upon direct examination by def't's counsel testified as follows:

1. Q. "You are the register of the land office here, are you not, Mr. Jones?

A. "Yes, sir."

2. Q. "What is it that you have in your hands, sir?"

A. "It is our official plat of township 25, south of range 32 east."

3. Q. "On file in your office?"

A. Yes, sir.

A certified copy of the same is here offered in evidence by def't the same showing the meander line.

To the introduction of which pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court overruled, and permitted the same to be introduced in evidence and shown to the jury (marked Ex. "2" def't's proofs.) To which ruling the pl'ff's counsel duly excepted, and said exception was then and there duly allowed and recorded as appears on page 540 of said transcript.

Ninth. ALVA SPRINGER, the def't called in his own behalf on def't's case-in-chief on direct examination by def't's counsel testified as follows:

68 1 Q. "Where do you live, Mr. Springer?"
A. "I live near the sod-house, near the mouth of the Blitzen river."
2. Q. "In this county and State?"
A. "Yes sir."
3. Q. "You are the defendant in this case, I believe?"
A. "Yes, sir."
4. Q. "Are you a married man?"
A. "Yes, sir."
5. Q. "And have a family?"
A. "Yes sir; a wife and two children."
6. Q. "And you live there on this land that is in controversy here, as your home, do you?"
A. "Yes sir."
7. Q. "When did you first come there?"
A. "I went there in July 1888."
7. Q. "Did you see Mr. French when you first went there?"
A. "I seen him a few days before I went there."
8. Q. "I mean when did you first come to that part of the country?"
A. "In June, 1888 was the first time."
9. Q. "Where did you go when you first went there; what part or particular portion of land there in that vicinity did you go on?"
A. "I went on a piece of land south of this."
10. Q. "About how far south of where you are now?"
A. "Well, south and east something over a quarter of a mile; between that and a half mile."
11. Q. "Did you see Mr. French when you first went there on that land?"
A. "No sir, not at that time."
12. Q. "Where did you go after having gone there and gone on that land? What did you mean by going on that piece of land; what did you do with it?"
A. "I located a piece of land there; and put some lumber on that."
13. Q. "For what purpose?"
A. "I calculated to locate there."
14. Q. "And what did you put the lumber there for?"
A. "For a house."
15. Q. "After that, where did you go?"
A. "Back to Harney."

16. Q. "For what purpose?"
A. "To get some more lumber and my family."
17. Q. "What did you do when you got to Harney?"
A. "I went to the saw-mill and got some more lumber, and then started back down there."
69 18. Q. "With your family?"
A. "Yes sir."
19. Q. "And your household possessions and stock?"
A. "Yes sir."
20. Q. "When did you see Mr. French then?"
A. "I met Mr. French there near the sod-house as I went back."
21. Q. "Did you know him at that time?"
A. "By sight, yes, sir."
22. Q. "Did you have any conversation with him there?"
A. "I met Mr. French right on this side of Saddle Butte, something like a mile or so, my wife was driving the team and I was driving some milk cows. I was off to the side of the road a little ways and Mr. French was in a cart, I think, anyway he was in a rig of some kind and he drove out to where I was and asked me if I was the man"——

Here the witness was interrupted by counsel for pl'ff who here objected to any statement of any conversation between this defendant and Mr. French, as incompetent, irrelevant, immaterial, hearsay, and not the best evidence.

Which objection the court thereupon overruled and permitted the witness to continue, to which ruling, pl'ff's counsel then and there excepted and the said exception was then and there duly allowed and recorded as appears on page 543 of the said transcript.

The witness continuing: "And he asked me if I was the man that had some lumber down west of the sod-house; and I told him that I was; then he wanted to know if I was taking a ranch there, and I told him that I had, and he told me then that that was his land, he says: 'You have got your lumber on my land,' but he said that if I would move over north of the meander line that he didn't claim that and that it was all right, but that land where this lumber was he claimed as his."

23. Q. "Which side of the meander line was the lumber on at that time?"
A. "It was on the south side."
24. Q. "Did he have any plats or maps or anything of that kind with him at that time?"
A. "Yes sir."
25. Q. "What did he do with reference to those if anything?"

Here counsel for pl'ff interposed the same objection as before, and the court thereupon made the same ruling, overruling the objection and permitting the witness to testify to the conversation, to
70 which ruling the pl'ff's counsel then and there duly excepted and said exception was then and there duly allowed and recorded as appears on page 543 of said transcript.

A. "He said that he had a plat of the country and could show me that I was on surveyed lands; and he showed me on this plat where the meander line run, and told me that he didn't claim any of the land north of that, but that the land south of that he claimed as his."

26. Q. "What did he do after that, then?"

A. "What did he do?"

27. Q. "No what did you do after that?"

A. "I went on down to the place and moved the lumber and my family over onto this place where I am now."

28. Q. "Why did you move that lumber and stuff over to the other side, sir?"

A. "To keep out of trouble, sir."

29. Q. "Did that conversation you had with him have anything to do with your moving over there?"

A. "Yes sir."

30. Q. "Well, tell the jury whether you would have gone over there if you hadn't had that conversation with him?"

Hereupon pl'ff's counsel interposed the same objection as last above, whereupon the court made the same ruling, overruling the objection and permitting the witness to testify, to which ruling the pl'ff's counsel then and there duly excepted, which exception was then and there duly allowed and recorded as appears on page 544 of said transcript.

A. "No, sir."

31. Q. "What would you have done about locating on the place where your lumber was and building your house there if you hadn't met him."

Hereupon pl'ff's counsel interposed the same objection as last above, whereupon the court made the same ruling, overruling the objection and permitting the witness to testify, to which ruling pl'ff's counsel then and there duly excepted, and said exception was then and there duly allowed and recorded as appears on the same page of the transcript last above referred to.

71 A. "I would have built there."

32. Q. "You would have built your house and gone to living there?"

A. "Yes, sir."

33. Q. "But because of what Mr. French told you you moved to where you now are?"

Hereupon pl'ff's counsel interposed the same objection as last above whereupon the court made the same ruling, overruling the objection and permitting the def't to answer, to which ruling the pl'ff then and there excepted and the said exception was then and there duly allowed and recorded as appears on the same page of transcript just above referred to.

A. "Yes, sir."

Tenth. The same witness, to wit, def't being on the stand upon def't's case-in-chief, on further direct examination by his counsel, in testifying to a conversation between French and himself when he first went onto the land in dispute was asked by his counsel "to tell us all that was said there at that time as near as you can remember," when the question and any conversation between French and def't at that time—1888—was objected to by the pl'ff's counsel as incompetent, irrelevant, and immaterial, whereupon the objection was overruled by the court, and the question was put and the conversation admitted. "He told me that if I hauled posts there for fencing, to haul good ones, that he didn't want to buy splinters."

To which ruling the pl'ff's counsel excepted and the exception was then and there duly allowed and recorded as appears on page 547 of the transcript.

Eleventh. The same witness being on the stand, to wit, def't on def't's case-in-chief on further direct examination by his counsel, having testified to having received a letter from French, was asked:

65. Q. "Up to the time when you got this last epistle, did you know he made any claim to that land you occupied there?

To which question pl'ff's counsel then and there objected as incompetent, irrelevant, and immaterial.

72 Which objection the court thereupon overruled, to which ruling pl'ff's counsel then and there excepted and the exception was then and there allowed and recorded as appears on page 550 of the transcript and the witness answered:

"No, sir, that is the first that I ever knew that he claimed them."

Twelfth. The same witness being on the stand, to wit, def't on def't's case-in-chief, on further direct examination by his counsel, he was asked the following:

85. Q. "Have you any improvements on your place? A. "Yes, sir."

86. Q. "What does it consist of?"

To which last question pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

Which objection the court thereupon overruled, permitted the question to be put and the witness to answer as follows:

A. "I have a house there and some corrals and some fencing; I have the place fenced, that is, Mr. French's fence encloses the place on the south side."

To which ruling pl'ff's counsel duly excepted, and said exception was then and there duly allowed and recorded as appears on page 554 of the transcript.

And defendant having rested his case-in-chief; and pl'ff having introduced in evidence a copy of a Government map showing the general location of the country around Malheur lake and the

same marked Exhibit "J" plaintiff's proofs and made part of the record herein and is hereto attached and made a part hereof, and having called in rebuttal several witnesses and among others PETER FRENCH, who having testified to having caused a map or plat to be made under his supervision and direction showing the meander line of Malheur lake and the borders of the pl'ff's lands and the territory they cover from the meander line south for a distance, copied from a map in the surveyor general's office, the lands within the green border being pl'ff's and the map being correct so far as it is a general representation of the pl'ff's lands upon the line of the Blitzen down to the meander line of the lake; and that the acquirement of those lands and the large stock interests con-
73 nected therewith, now the business and property of the French-Glenn Live Stock Co. has been the study of his whole life since boyhood; the said map was introduced in evidence for the purpose of showing the extent of the pl'ff's enterprize, and which having been received and shown to the jury was marked and filed as Exhibit "L" pl'ff's proofs and made part of the records in this case and also part hereof. And pl'ff having finally rested, the def't was recalled upon rebuttal, and he having testified upon such rebuttal def't also closed his case. Whereupon after argument of counsel, the court charged the jury as set forth in full in said transcript and after having said to them among other things

"The principal question for you to decide, gentlemen of the jury, is a question of fact; and that fact is whether or not these lands upon which the def't has settled, and is settled at the present time, are lands included in the adjoining tract of land, described by the pl'ff in this case, and to which they claim title; and which they claim belongs to this land by virtue of these extending lines, or accretions, as they call it, which extend out into this lake which is called Malheur lake."

Also the following:

"I instruct you, gentlemen of the jury, that by virtue of an act of Congress passed March 12th, 1860, the provisions of an act of Congress passed Sept. 28th, 1850, entitled An act to enable the State of Arkansas and other States to reclaim the swamp lands within their boundaries, *was* extended to the States of Minnesota and Oregon; and by said act the U. S. granted to the State of Oregon all the swamp and overflowed lands within its boundaries; and by said act it was left the duty of the Secretary of the Interior to designate such lands and approve the selection thereof; and before any particular tract of land could become the property of the State of Oregon, the same were to be selected, and such selections approved by the Secretary of the Interior although this act was a grant *in presenti*, in other words, a present grant at the time of the passage of the act of M'ch 12, 1860, all selections were to be approved by such Secretary
74 of the Interior before title could pass to the State of Oregon to any definite tract.

"If you find, gentlemen of the jury, that pl'ff was, prior to the 24th day of January, 1894, a private corporation, duly existing under the laws of the State of California (and it is admitted that

the corporation was organized and existing under and by virtue of the laws of the State of California; and that may be considered by you as a fact) and still is such and doing business in the State of Oregon, having the right to acquire and hold lands; and that on the 24th day of January, 1894, said pl'ff by deeds duly executed from the grantee of the State of Oregon, and under the patent of the United States, became the purchaser of the fractional lots three and four in section thirty-four and lots one and two in section 35, in township 26 south, range No. 31 E. Willamette meridian, lying south of the Malheur lake, then its title unless restricted by some clause in the deed of conveyance extended to the center of Malheur lake, if you find from the evidence in this case that the north line of said lots was, at the time of the U. S. survey the south meander line of said Malheur lake and that said lake was unnavigable.

"I instruct you further that after the meander line of an unnavigable stream or lake has been surveyed, and such survey approved by the Government of the United States, the plat thereof filed in the local land office in the district wherein the said meander line was so surveyed and after the Government has parted with its title to other persons in the lands lying upon the borders of said lake abutting upon said meander line, then the owners of said lands so abutting upon said meander line and upon the shores of a stream or lake so meandered are entitled to become the owners of all accretions to said lands either by the depositing of sediment or earth in front thereof, or by the receding of the waters of said stream or lake, even to the center of such stream or lake.

"I instruct you that the recession of the waters of a stream or lake, and by recession I mean the receding of the water, may be caused by artificial or natural means; and it makes no difference whether such accretions have occurred gradually through a long period of time, or whether suddenly as by some convulsion
75 of nature."

And also after having charged the said jury to this effect, to wit:

"I instruct you that you are bound to find this lake boundary to be where the plat of survey and the field-notes of the Government survey have designated it to be from all the facts in this case.

"The Government by the aid of its proper officer has a right to fix and declare the place of the lake for the purposes of the survey and for the sale of the land and after that place has been so designated by such survey and such survey approved and acted upon by the Government, such survey cannot after the rights of third parties have intervened, be questioned or contradicted.

"I instruct you that meander lines are run when surveying fractional portions of public lands bordering upon unnavigable streams or lakes not as the boundaries of a tract but for the purpose of defining the sinuosities of the banks of the stream or lake as nearly as practicable and as a means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes a meander line is represented as the border line of the unnavigable stream or

lake, and shows to a demonstration that the channel of the river course or the center of the lake, as the case may be, and not the meander line as actually run on the land is the boundary.

"I instruct you that a patent of the U. S. cannot be questioned collaterally but before its validity can be impeached or questioned it must be shown that such patent has been set aside by a court of competent jurisdiction, and this is not such an action or suit.

"If you find under the instructions I give you and under the evidence in this case that the pl'ff was at the time of the commencement of this action the owner of the lands in controversy by reason of being the owner of fractional lots 3 and 4 in section 34 and 1 and 2 in section 35, township 26 south, range No. 31 E. Willamette meridian, on the south side of Malheur lake, then I instruct you
76 that the defendant could no more rightfully detain possession of the lands in controversy than he could of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, unless he claimed under the pl'ff or its grantors or predecessors.

"I further charge you that if you find that the Government of the United States did in the year 1877 make an approved survey of the meander line on the south side of Malheur lake and the said line was established as the north line of fractional lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian lying south of Malheur lake; and if you find that since said time it has patented said fractional lots to other persons, the grantors and predecessors of the pl'ff then the Government had not nor has it any right to disturb said meander line even though actually at the time of said survey there were lands lying between said meander line and the actual border of the lake.

"I charge you that the following is the rule for construing the descriptive part of a conveyance of real property when the construction is doubtful and there *is* no other sufficient circumstances to determine it. When a road or stream of water not navigable is the boundary the rights of the grantor to the middle of the road or bed of the stream are included in the conveyance except where the road or bed of the stream is held under another title.

"I further charge you that where a stream is meandered in the public surveys, the stream and not the meander line is the true boundary of the riparian owner.

"Such is the law of this State and in accordance with it I charge you that if you find that the pl'ff was prior to the time of the commencement of this action the riparian owner of the fractional lots I have mentioned bounded by a meander line and that there are lands between the meander line and the water line of Malheur lake the pl'ff is and was also the owner of the lands between the meander line and the water line, be it small or great, and you
77 must find for the pl'ff if you further find from the evidence and the instructions I give you in this charge, the other material allegations of the complaint to be true, and the def't's plea of estoppel not sustained.

"If the jury find from the evidence that at the date the acts and words constituting the estoppel plead by the def't in this case the legal title to the lands in question was in the State the defense of an estoppel fails and the jury will not consider such acts and words.

"I charge you gentlemen of the jury that a lake is a large and extensive collection of water contained in a hollow of the earth and it is not necessary that the same be wholly an open body of water."

Which, after having so charged the jury at the request of the pl'ff the court followed up with the following charges, given at the request of defendant and duly excepted to by the pl'ff to wit:

Thirteenth exception.

"I instruct you, gentlemen of the jury that the pl'ff in this case must succeed, if at all, upon the strength of its own title to the lands described in the complaint; and it devolves upon the pl'ff to convince you by a preponderance of the evidence that it is the actual owner of all the land described in the complaint; and unless you are so convinced you must find for the def't."

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Fourteenth exception.

Whereupon the court further instructed the jury as follows:

I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34; and lots 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defend-

78 ant.

To which instruction pl'ff's counsel duly excepted and the said exception was then and there duly allowed and recorded.

Fifteenth exception.

The court also instructed the jury as follows:

I instruct you that before you can find for the pl'ff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34 and 1 and 2 in section 35 township 26 south, range No. 31 E. Willamette meridian; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake.

To which instruction the pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Sixteenth exception.

The court also instructed the jury as follows:

"The evidence in this case shows that pl'ff was the owner of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, in this county. This is not the property described in the complaint in this cause; but the pl'ff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for pl'ff to recover in this action, it must be shown by a preponderance of the evidence that on or about the 12th day of M'ch 1860 said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the def't.

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Seventeenth exception.

The court also instructed the jury as follows:

I instruct you before you can find for the pl'ff you must be
79 satisfied from a preponderance of the evidence that lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian bordered on the meander line. You must also be satisfied from a preponderance of the evidence that the waters have receded and left the lots described in the complaint, here in dispute, as accretions to said land, or from which the waters have permanently receded so as to leave them in the condition they are now.

To which instruction pl'ff's counsel duly excepted and said exception was then and there duly allowed and recorded.

Respectfully submitted,

THORNTON & WILLIAMS AND
CHAS. W. PARRISH,
Plaintiff's Attorneys.

STATE OF OREGON, } ss:
County of Grant, }

I hereby certify that I have examined the foregoing bill of exceptions presented by the plaintiff and appellant in the above-entitled cause, and that the same are true and correct; and that attached thereto, marked "Transcript of evidence in case of French-Glenn Live Stock Company *vs.* Alva Springer" and made part thereof is a true transcript of all the said evidence adduced upon either side on the trial of said cause; and that the same is so attached and made part thereof for the purpose of more fully and particularly presenting the questions involved on this appeal.

Dated at Canyon City, Oregon, this 4th day of April, 1898.

MORTON D. CLIFFORD,
Circuit Judge.

80 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room in the city of Salem, on the first Monday, the 6th day of March, 1899, present: Honorable Charles E. Wolverton, chief justice, Honorable Robert S. Bean, associate justice, Honorable Frank A. Moore, associate justice, and J. J. Murphy, clerk, the following proceedings were had on Friday the 11th day of August, the same being the 76th judicial day of said term:

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant, *vs.* ALVA SPRINGER, Respondent. } Appeal from Harney County.

This cause having heretofore to wit: on the 22d day of June, 1899, been argued and submitted by the attorneys of the respective parties above named, and by the court then reserved for further consideration, and the court having duly considered all the questions presented by the transcript herein and the arguments of the respective attorneys thereon, and being now fully advised in the premises, finds that there is not error as alleged. It is therefore considered, ordered, and adjudged that the judgment in this cause in the court below rendered be and the same hereby is in all things affirmed.

And it appearing to the court that the appellant filed an undertaking for the appeal and for a stay of proceedings also with Leon M. Brown and I. S. Geer as sureties therein, it is further ordered and adjudged that the respondent recover of appellant and Leon Brown and I. S. Geer, its said sureties, his costs and disbursements in this court upon the appeal allowed and taxed at $77.50 and his costs and disbursements in the court below there taxed at $281.00.

It is further ordered that the cause be remanded to the said court below and that a judgment be there entered and docketed in accordance herewith.

80½ THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant, *v.* ALVA SPRINGER, Respondent.

Appeal from Harney county; Hon. Morton D. Clifford, judge.

W. Lair Hill, for appellant.
L. R. Webster, for respondent.
Wolverton, C. J.
Affirmed.
Filed Aug. 11 1899.

J. J. MURPHY, *Clerk*,
By —— ——, *Deputy*.

81 This is an action to recover the possession of 160 acres of land, situate in Harney county, Oregon, lying to the north of and adjoining lots numbered 3 and 4 of section 34 and lots num-

bered 1 and 2 of section 35, township 26 south, range 31 east of the Willamette meridian, as described on the maps of survey of the said township in the office of the register and receiver of the United States land office at Burns, Oregon. The cause was tried before a jury, and, the verdict and judgment being for the defendant, the company appeals.

The plaintiff, to support its contention of ownership of the fee, offered in evidence, (1) the official plat of the United States Government survey of fractional township 26 south, range 31 east of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur lake, which plat appears to have been approved by the Land Department of the Government and filed in the local office on September 17, 1877; the plat shows said lots as bounded on the north by the meander line of Malheur lake; (2) the field-notes of the survey of the exterior boundaries of said township and its subdivisions, and the meander line of Malheur lake, under the title heading, "Meanders of the south shore of Malheur lake, through fractional township 26," etc., and indicating that it was run "with the meander of the lake;" (3) a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; (4) two patents from the United States, for said lots 3 and 4, section 34, and 1 and 2, section 35, "according to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general." The patents bear date March 10, 1890, and October 8, 1891, respectively. The lots contain, in the aggregate, 158.53 acres; (5) two conveyances from the State, comprising the above-described lots, bearing date October 7, 1889, and April 30, 1890, respectively, and other mesne conveyances to the
82 plaintiff; and (6) oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney lake; that its waters were from 8 to 12 feet higher than those of Harney lake; that, in 1881, the waters of Malheur lake, overflowing the ridge, cut a channel through, which was enlarged from year to year for some time; that, as a result, its surface was lowered, the waters receding from the flat, shelving shore leaving the disputed land bare, except in the springtime, from and after 1884. This constituted the plaintiff's case. On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that

there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots.

The court instructed the jury as follows, to which exceptions were taken and saved by the plaintiff: "I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range 31 east, is not conclusive evidence of the existence of a lake. You will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant. * * * I instruct you that, before you can find for plaintiff, you must be satisfied from a preponderance of
83 the evidence that there was a lake immediately north of lots 3 and 4 in section 34 and lots 1 and 2 in section 35. * * * But if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant; in other words, it is a fact for you to determine whether or not that was a lake." Other instructions of a like nature were given, but these fairly illustrate the whole.

WOLVERTON, *C. J.*:

It has become a settled rule of law in this State that, where a stream is meandered by the public surveys, the stream, and not the meander line, is the true boundary of the riparian owner: Weiss *v.* Oregon Iron &c. Co., 13 Or. 496. The rule is alike applicable where a lake is meandered by the public survey. The shore of the lake becomes the real boundary of the abutting fractional subdivisions, or lots, as they are termed, and not the meander line as surveyed, if there is found to be a discrepancy between the two: Hardin *v.* Jordan, 140 U. S. 371; Mitchell *v.* Smale, 140 U. S. 406. The reason which prompted the rule is the difficulty which always exists in meandering exactly the edge or margin of a stream or lake or other natural body of water, owing to irregular projections and the various sinuosities of the water line; hence, the meander line is supposed to be run by exclusions and inclusions of such irregularities of contour, so as to produce an average result, closely approximating the true and real quantity of upland contained in fractional subdivisions or lots bordering upon the water front. It was said by Mr. Justice Clifford, in Railroad Company *v.* Schurmeir, 7 Wall. 272, "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser, in preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a
84 demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary." As we

have seen, the same rule applies to lakes. The banks of the stream and the shores of the lake constituted monuments which serve to mark the true boundary, and they should ordinarily prevail, under the general rule, as against courses and distances. Mr. Justice Bradley, in Mitchell *v.* Smale, *supra*, states the doctrine clearly: "The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow." This doctrine was recognized and adopted in Barnhart *v.* Ehrhart, (Or.) 54 Pac. 195.

It is a question of no moment to the parties in the present controversy whether the shore or upland owner takes to the water's edge, or to the center of a non-navigable lake, or what title, if any, has been acquired by reason of such ownership without reservation in the muniments of title to the land under the water of the lake, as in any event the owner is entitled to all land between the original line and the water's edge, which shall have become bare by accretion or a gradual and imperceptible recession of the water, not extending beyond the center of the lake. In this, counsel for the parties, as we understand them, concur; so that there is little need of our discussing the question, and we shall do no more than denote briefly the reasons upon which the doctrine rests. The one generally given is that the owner is subject to the loss of soil by the encroachment of the water, hence, that he should have the benefit of accretions on account of its recession, and thus, upon a general average, the gain will balance the loss, and *vice versa*.

The maxim "*de minimis non curat lex*" is also applied. Another, and, perhaps, a more cogent one invoked, is that it preserves the fundamental riparian rights, which often constitute the principal value of the land—of access to the water. These principles find support in the following authorities: Minto *v.* Delaney, 7 Or., 337; Hardin *v.* Jordan, *supra;* Mitchell *v.* Smale, *supra;* Fuller *v.* Shedd, 161 Ill. 462; Poynter *v.* Chipman, 8 Utah 442; Jefferis *v.* East Omaha Land Co., 134 U. S. 178; Lamprey *v.* Metcalf, 53 N. W. 1139.

The real question of cardinal and pivotal concern arises upon the urgent and strong contention and argument of counsel for plaintiff, that the official survey of the lake, the approval thereof, and the official plots and maps made thereunder, showing the lake and the meander line thereof, conclusively establish the fact and location of the lake, so far as the rights of riparian grantees are concerned, and the Government and its grantees are estopped to deny the supposed fact as represented to the purchasers of abutting land. Mann *v.* Tacoma Land Co., 44 Fed. 27, supports this contention in its

fullest signification; and Mitchell *v.* Smale, *supra*, may be said to sustain it.

Defendant's counsel denies that any hard and fast rule of the kind exists, but asserts that, even if it does, it can have no application in the present controversy, for two reasons: One, that the abutting or upland, represented by the lots to which plaintiff deraigns title from the Government, was swamp and overflowed land; that the title, under the patent from the Government, took effect by relation, as of March 12, 1860, the date when the swamp-land act of Arkansas was extended to Oregon; that the public survey having been made in 1877, subsequent to the passing of the title out of the Government, there could have been no representation by the General Government prior to sale that it bordered the lake or other natural body of water, hence estoppel could not apply. In this connection, the idea is also advanced that the grantee of swamp and overflowed lands takes only such as is of that special character, and that the land under the water, forming the bed of the lake,
86 not being of that character, could not pass in any event; in other words, that the limit of the swamp must necessarily be the limit of the grant. The other is that there never existed a lake in front of or bordering upon the plaintiff's lots; that the question of fact involved is not one of accretion or recession of the water, and consequent reliction, but of the existence of the lake upon which plaintiff anchors its claim; that this question was submitted to the jury, and, as the verdict was against the plaintiff, it is now precluded.

We will not now attempt to determine whether the first reason assigned is sound or not, or whether any rule of law exists, based upon and in consonance with it, as it is not deemed necessary to a decision of the controversy.

The second reason, however, we deem quite sufficient and ample for affirming the judgment below. If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of said lots; hence, resort must be had to the secondary evidence, viz., the courses and distances, which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field-notes of the survey of the fractional sections, and the supposed meander line. We are not without authority for this view. Grant *v.* Hemphill, 59 N. W. 263, is a case very much to the purpose. That was tried in a court of equity, and the facts were found by the court. Rothrock, J., who wrote the opinion in the supreme court, says: "It appears, from a very decided preponderance of the evidence, that the land in controversy is not now, and probably never was, any part of a lake. It is true that some of the witnesses testify that the inlet of Mud lake extended up into the land. But there is no evidence that at or near the time of the survey, or since, there has been any body of water anywhere on the land, upon which to base a meandered line. Some of the land, like all bodies of land in that country, is low, flat,

and marsh land, but the evidence shows that a greater part of the land claimed by Eaton is dry, tillable land, and that if it had
87 been surveyed it would not have passed to the State under the swamp-land grant. * * * A riparian proprietor is one who owns land bounded upon a water-course or lake. The evidence in this case shows that there was not at the time of the Government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. In the large mass of authorities collected and cited by counsel, we find no case which can be said to sustain a claim made upon any such a state of facts." We have had occasion to cite that case before, with approval of the doctrine there enunciated: Western & Hawaian Co. *v.* Bank (Or.), 57 Pac. 912.

Now, the plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots and upon which they abutted at the time of the survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel from natural causes, through a narrow reef or ridge extending across between Malheur and Harney lakes, by which the water of the former was drawn off into the latter, and a consequent reliction of the land bordering said lots, which constitute the land in dispute and to which plaintiff claims title. The defendant controverted this position, and sought and introduced evidence tending to show the non-existence of such a lake at the time of the survey, and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of plaintiff, and that no part of it now, or at the time of the survey, extended westward, in front or to the north of them. Several witnesses testified, in effect, that there was no open body of water of any moment in front of the lots; that the land was low and flat; that a portion of it was of a marshy or swampy character, but much of it, perhaps the greater portion, was dry and not covered with water, except at certain seasons of the year, when the water was unusually high, and that it was the same character of some of the land that is comprised within the boundaries of said
88 lots, and that this condition of affairs has existed since prior to the survey of 1877. Many circumstances were related, tending to support the truth of the testimony. The issues of fact were clear and distinct, and, having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff, as in other cases where a jury has passed upon a submitted question of fact.

If it be said that the result is a collateral impeachment of the Government survey, the answer is decisive that the Government ought not to be precluded by a meander line, which does not approximately and by general average border the banks of the stream or the shores of the lake which it is the purpose of a public survey to meander. If there was no lake to meander, the purchaser could not have bought upon the representation of the Government that

there was, and cannot become a riparian owner, and, therefore, can claim none of the rights appurtenant thereto. So, turn the matter which way we will, the facts do not present a case which, under the usual reasons assigned, will preclude the Government or its grantees. The result, that the plaintiff should acquire by the purchase of these lots several multiples of their area, as was remarked by Mr. Justice Brewer, in his dissenting opinion in Mitchell *v.* Smale, *supra*, is "certainly suggestive," and the case ought to be a clear one to support and sustain it. The instructions to the jury were in accord with the views here entertained, and hence there was no error in giving them.

There was evidence introduced, over the objection of the plaintiff, touching the declaration of Peter French, an officer and stockholder in the plaintiff corporation, to the effect that he or the company did not own the land in front of the lots, and that this was one of the inducements for the defendant to enter upon and occupy it. It is claimed that this was admitted under the allegations of the answer, by which it was sought to estop the plaintiff to claim the land; that the answer was entirely insufficient for that purpose, and hence that the evidence was wholly irrelevant and therefore hurtful. Whatever may have been the issue in that regard,
89 there was a claim for damages, and the evidence had a material bearing upon that question; hence, there was no error in the premises.

During the course of the presentation of the defendant's case, the plaintiff objected to a certain interrogatory propounded to one of his witnesses, and the objection being sustained, defendant's counsel was permitted to state to the court, in the presence of the jury, what the testimony was that he expected to elicit by the question; and this was assigned as error. It is usual in the trial of causes, where a party is desirous of introducing testimony, and is overruled when the question is asked touching it, for counsel to state to the court what he expects to prove by the witness; and this he does for the purpose of saving the proper exception and making his point clear to the appellate court A statement of that character, in the presence of the jury, has never been held, as we are aware, to constitute reversible error.

One of defendant's witnesses was permitted to testify touching the fact that he had raised grain upon the land situate to the north of the meander line, but not in front of the plaintiff's lots, and this is assigned as error. The pivotal question before the jury, as we have seen, was whether a lake existed in front of these lots, and this testimony was pertinent to that issue, and there was, therefore, no error in permitting it to go to the jury.

These considerations affirm the judgment of the court below, and it is so ordered.

90 In the Supreme Court of the State of Oregon.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff in Error,
vs.
ALVA SPRINGER, Defendant in Error.

To the Honorable Charles E. Wolverton, chief justice of the supreme court of the State of Oregon:

Now comes The French-Glenn Live Stock Company, the plaintiff in error in the above-entitled cause, by its attorney, and says that on the 11th day of August 1899, the supreme court of the State of Oregon, being the highest court of said State in which a decision in said cause could be had, gave and entered a final judgment in said cause in favor of Alva Springer, the defendant in error (who was the defendant in said court) and against the plaintiff in error (who was the plaintiff in said court) in which judgment and the proceedings had prior thereto in said cause certain errors were committed, to the prejudice of the plaintiff in error, in that the title and right of possession of certain lands described in the complaint, and being the subject-matter involved in this cause, were drawn in question, which title and right were set up and claimed by plaintiff in error under certain statutes of the United States, namely, the act
91 of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, and the act entitled "An act to extend the provisions of 'An act to enable the State of Arkansas and other States to reclaim the swamp land within their limits;' to Minnesota and Oregon, and for other purposes," approved March 12, 1860; the plaintiff in error setting up and claiming title and right of possession of said lands under patents issued under said statutes, and the decision of said supreme court, and the judgment so given and entered as aforesaid, were against the title and right so set up and claimed by the plaintiff in error, and the plaintiff in error was thereby deprived of the benefit of the title and right of possession so claimed.

Wherefore the plaintiff in error, The French-Glenn Live Stock Company, prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the said supreme court of the State of Oregon, for the correction of the error so complained of; that a transcript of the record, proceedings, opinion, and papers in this cause, duly authenticated may be sent to the said Supreme Court of the United States; and that the said judgment may be examined and reversed.

WILLIAM LAIR HILL,
Attorney for Plaintiff in Error.

91*a* The foregoing petition is allowed, a bond in the sum of $500.00 to be filed by the petitioner.

Dated, March 31st 1900.

CHAS. E. WOLVERTON,
Chief Justice of the Supreme Court of the State of Oregon.

92 [Endorsed:] Supreme court State of Oregon. The French-Glenn Live Stock Co. *vs.* Alva Springer. Petition for writ of error. Filed March 31, 1900. J. J. Murphy, clerk Wm. Lair Hill att'y for pl'ff 957 Broadway Oakland Cal. F. C. Lusk, Chico, Butte county, California.

93 In the Supreme Court of the State of Oregon.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff,
vs.
ALVA SPRINGER, Defendant.

Bond.

We, The French-Glenn Live Stock Company of the State of Cal. and The Fidelity and Deposit Company of Maryland, are held and firmly bound unto Alva Springer in the sum of five hundred dollars to be paid to him, his heirs, executors or administrators, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The French-Glenn Live Stock Company, plaintiff above named has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment and decree rendered in the above-entitled court and cause; and the condition of this obligation is, that if The French-Glenn Live Stock Company shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force.

Dated, signed and sealed on April 6th, 1900.

THE FRENCH-GLENN LIVE STOCK COMPANY, [SEAL.]
By E. P. McCORNACK, *Att'y.*

[Seal Fidelity & Deposit Company of Maryland, Incorporated 1890.]

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By GEO. B. GRAY, [SEAL.]
A Member of Its Local Board, and
By SCOTT BOZORTH, *Local Agent.*

94 STATE OF OREGON, } *ss:*
County of ——, }

—— —— and —— ——, being duly sworn, each for himself, says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident and freeholder of the State of Oregon, and am worth the sum of —— over and above all my just debts and liabilities, in property situated in the State of Oregon which is not exempt from execution.

—— ——.
—— ——.

Subscribed and sworn to before me on —— —, 1900.

——— ———,

Notary Public in and for the County of ——, State of Oregon.

The foregoing bond approved, on Apr. 7th, 1900.

CHAS. E. WOLVERTON,

Chief Justice of the Supreme Court of the State of Oregon.

95 [Endorsed:] Supreme court State of Oregon, The French-Glenn Live Stock Co. *vs.* Alva Springer. Bond on writ of error Filed April 7, 1900 J. J. Murphy clerk Wm. Lair Hill att'y for pl'ff, 957 Broadway Oakland Cal. F. C. Lusk, Chico, Butte county, California.

96 UNITED STATES OF AMERICA, *ss:*

To Alva Springer, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, District of Columbia, on June 18th, 1900, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Oregon, wherein The French Glenn Live Stock Co., plaintiff, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Wolverton, chief justice of the supreme court of the State of Oregon, on this April 24th, 1900.

CHAS. E. WOLVERTON,

Chief Justice of the Supreme Court of the State of Oregon.

Service of the foregoing citation is admitted, on May 11, 1900.

LIONEL P. WEBSTER,

Attorney for Defendant in Error.

[Endorsed:] French Glen Live Stock Company *v.* Alva Springer Citation Filed May 14 1900 J. J. Murphy, clerk; by J. W. Reeves deputy.

97 In the Supreme Court of the State of Oregon.

THE FRENCH-GLENN LIVE STOCK COMPANY, Plaintiff, *vs.* ALVA SPRINGER, Defendant. } Assignment of Error.

The plaintiff, by its attorney and counsel, in connection with its petition for writ of error in this cause, says that the judgment of the supreme court of the State of Oregon given and rendered herein, is erroneous and prejudicial to the rights of the plaintiff in the particulars following, that is to say:

1. The said supreme court erred in sustaining the ruling of the

circuit court of said State under which G. Marshall, a witness for the defendant was allowed to testify and did testify upon the trial of this cause in said circuit court, over the objection of the plaintiff, that he, the said Marshall, had raised grain upon land lying between the meander line of Malheur lake as surveyed and platted by the United States Government, approved by the Land Department of the Government, and on file by the United States land office at Burns, and the margin of the lake as it actually existed, to which said testimony the plaintiff objected at the time it was offered before said circuit court, that it was immaterial, the said circuit court overruled the objection and that ruling was excepted
98 to and assigned as error in the said supreme court.

2. The said supreme court erred in sustaining the ruling of the said circuit court under which ruling L. B. Springer, a witness for the defendant, was allowed to testify upon the said trial in said circuit court, over the objection of the plaintiff, that he the said L. B. Springer had raised garden- upon land lying between the meander line of Malheur lake aforesaid and the water of said lake to which said testimony the plaintiff objected at the time it was offered upon the ground that it was immaterial, the said circuit court overruled the objection, and that ruling was excepted to and assigned as error in the said supreme court.

3. The said supreme court erred in sustaining the ruling of the said circuit court, under which ruling said L. B. Springer was allowed to testify, over the objection of the plaintiff, that gardens were raised upon places north of the meander line of said Malheur lake, upon the land north of the meander line and west of the land in dispute in this action, to which testimony the plaintiff objected at the time it was offered before said circuit court upon the ground that it was immaterial, the objection was overruled by said circuit court, and that ruling was excepted to and assigned as error in the supreme court.

4. The said supreme court erred in sustaining the said circuit court in its charging the jury as follows: "I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34, and lots 1 and 2 in section 35, township 26 south, range
99 31 east, Willamette meridian, is not conclusive evidence of the existence of the lake; you will therefore weigh and consider all the evidence in this case, and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant." Which ruling was excepted to by plaintiff at the time it was given, and was assigned as error in said supreme court.

5. The said supreme court erred in sustaining the said circuit court in its charge to the jury that the meander line established by the Government of the United States was not conclusive as to the place of the border of the lake; and that the jury must determine from all the evidence whether that place was the border of the lake at the time the Government survey was made; which ruling

and charge was excepted to by the plaintiff at the time it was given, and was assigned as error in the said supreme court.

6. The said supreme court erred in sustaining the ruling of the said circuit court in its charge to the jury that the official maps and plats of the United States surveys showing the existence of Malheur lake, and its meander line along its southern boundary, together with the field-notes of said survey, were not conclusive evidence of the existence of such lake, or of the line of its shore.

7. Sa d supreme court erred in not adjudging and deciding that the official plat of the United States surveys, and the field-
100 notes thereof, showing said Malheur lake and the meander line thereof, were conclusive evidence of the existence of said lake and of the place of its boundary.

8. Said supreme court erred in sustaining the ruling of said circuit court by which said circuit court refused to charge the jury, at the request of the plaintiff, as follows: "You are bound to find this lake boundary to be where the plat of the survey, and the field-notes of the Government survey, have designated it to be." Which refusal so to charge was excepted to by plaintiff, at the time, and was assigned as error in said supreme court.

9. Said supreme court erred in sustaining the ruling of said circuit court by which said circuit court refused to charge the jury, at the request of the plaintiff, as follows: "The Government by the aid of its proper officers has the right to fix and declare the place of the lake for the purposes of the survey and sale of the lands; and after that place has been so designated by such survey, and such survey approved and acted upon by the Government, such survey cannot, after the rights of third parties have intervened, be questioned or contradicted." Which ruling was excepted to by plaintiff, at the time, and was assigned as error in said supreme court.

101 And the plaintiff now prays that the judgment of said supreme court be reversed, and that a judgment be ordered in favor of plaintiff.

WILLIAM LAIR HILL,
Attorney of Plaintiff.

102 [Endorsed:] Supreme court State of Oregon The French-Glenn Live Stock Co. *vs.* Alva Springer Assignments of error Filed March 31 1900 J. J. Murphy clerk Wm Lair Hill att'y for pl'ff 957 Broadway Oakland Cal. F. C. Lusk, Chico, Butte county, California.

103 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the supreme court of the State of Oregon, Greeting:

Because of the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court (being the highest court of the State of Oregon in which a decision

in the hereinafter-mentioned suit could be had) before you, between The French-Glenn Live Stock Company, plaintiff, and Alva Springer, defendant, wherein was drawn in question, necessarily involved and passed upon, the validity of a statute of, and authority exercised under, the United States, and a title, right, privilege and immunity specially claimed by the said plaintiff under a statute of, and authority exercised under, the United States, and wherein it was decided against the title, right, privilege and immunity claimed by the said plaintiff, manifest error had happened, to the great damage of the said French-Glenn Live Stock Company, as by its complaint appears. We, being willing that error, if any has been done, shall be fully corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment should be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, on or before June 18 1900, in the said Supreme Court to be then and there held, to the end that the record and proceedings aforesaid being inspected, the said Supreme
104 Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, on this April 18th 1900.

[Seal United States Circuit Court, Oregon.]

J. A. SLOANE,
Clerk U. S. Circuit Court, District of Oregon,
By G. H. MARSH, *Deputy.*

STATE OF OREGON, *ss:*

The foregoing writ of error is hereby allowed on this 24th day of April 1900.

CHAS. E. WOLVERTON,
Chief Justice of the Supreme Court of the State of Oregon.

I hereby certify that the foregoing writ of error, with a copy thereof for the defendant, was lodged in the office of the clerk of the said supreme court of the State of Oregon, on April, 24th 1900.

Dated and signed on April 24th, 1900.

J. J. MURPHY,
Clerk of the Supreme Court of the State of Oregon.

105 In the Supreme Court of the State of Oregon.

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant,
vs.
ALVA SPRINGER, Respondent.

I, J. J. Murphy, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true, and complete copy of the record of said action certified to and filed

with our said court, as the transcript on appeal from the judgment of the circuit court of the State of Oregon for the county of Harney, from which the said appeal was taken, and is the record and transcript upon which said appeal was heard, and the judgment of our supreme court entered thereon on the 11th day of August, 1899, save and except the exhibits and the testimony taken in said cause.

I further certify that the foregoing transcript likewise contains a full, true, and correct copy of the judgment of our said supreme court upon the said appeal entered on the said 11th day of August, 1899, and a full, true, and correct copy of the opinion of the court filed, and upon which said judgment was entered.

I further certify that the petition for a writ of error in said cause and the endorsements thereon; the bond thereon and the endorsements thereon and approval; the citation and proof of service endorsed thereon; the assignment of errors and writ of error, all which are attached to the above and foregoing, are the original petition, bond approval, citation, assignment of errors, and writ lodged with and now in my office; and I do certify that the above and foregoing are such original papers so lodged and filed with me, and that the foregoing transcript is a true and correct copy of the papers and pleadings filed and of the proceedings had in the above-entitled cause in our said court as the same appears of record and on file in my office.

I further certify that the cost of the foregoing return to writ of error is $40.50 and that said amount was paid by E. P. McCornack for the plaintiff in error.

106 In witness whereof, I have hereunto set my hand and the seal of the supreme court of the State of Oregon, at my office in the city of Salem, in said State, this the 21st day of May, 1900.

[Seal Supreme Court, State of Oregon.]

J. J MURPHY,
Clerk of the Supreme Court of the State of Oregon.

107 [Endorsed:] No. —. In the supreme court of the State of Oregon. March term, 1900. The French-Glenn Live Stock Co., a corporation, appellant, *vs.* Alva Springer, respondent. Transcript.

108 In the Supreme Court of the United States.

THE FRENCH-GLENN LIVE STOCK COMPANY, Appellant,
vs.
ALVA SPRINGER, Respondent.

On writ of error to the supreme court of the State of Oregon.

It is stipulated that the longhand notes taken on the trial of this case and attached to the bill of exceptions and referred to in the certificate of the trial judge to the bill of exceptions, need not be printed

as a part of the record in this court, as the bill of exceptions, which will be printed, contains the testimony in narrative form.

C. A. KEIGWIN,
Attorney for Appellant.
C. E. S. WOOD,
Attorney for Respondent.

109 [Endorsed:] No. — In the Supreme Court, of the United States, The French-Glenn Live Stock Company appellant *vs.* Alva Springer respondent Stipulation

[Endorsed:] File No. 17,856. Supreme Court U. S. October term, 1901. Term No. 124. The French-Glenn Live Stock Co., P. E. *vs.* Alva Springer Stipulation to omit part of record in printing. Filed Oct. 15, 1901.

Endorsed on cover: File No. 17,856 Oregon supreme court. Term No. 124 The French-Glenn Live Stock Company, plaintiff in error, *vs.* Alva Springer. Filed August 3d, 1900.

In the

Supreme Court of the United States.

October Term, 1901.

THE FRENCH-GERMAN LAUNDRY COMPANY,
Plaintiff in Error,

vs.

No. 214.

OLIVE SPRINGER.

BRIEF FOR THE PLAINTIFF IN ERROR.

CHARLES A. BREWER,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE FRENCH-GLENN LIVESTOCK COMPANY,
Plaintiff in Error,
vs.
ALVA SPRINGER,
} No. 124.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement.

In the year 1877 the officers of the Interior Department surveyed certain lands in the State of Oregon lying contiguous and near to a large non-navigable body of water called Lake Malheur. The plats were duly approved and placed on file in the proper local land office, and have never been withdrawn, canceled, or otherwise discredited by the Government. The surveyed lands were sold and otherwise disposed of with reference to the plats of 1877. Certain tracts, designated as lots 3 and 4 in sec. 34, and lots 1 and 2 in sec. 35, T. 36 S., R. 31 E., were patented to the State of Oregon under the swamp land grant of March 12, 1860, and the title so conveyed has come to the present plaintiff in error (pp. 32, 33).

These lots were represented on the plat of 1877 as bounded on the north by the waters of Lake Malheur.

It appears that, in November, 1896, there was a body of dry land lying between the north boundary of the said lots, the meander line of the survey, and the then actual water line of the lake, and that the defendant Springer had occupied such intervening tract. The plaintiff in error brought suit, in one of the courts of Oregon, against Springer, to recover possession of this tract, claiming it as accretion to the patented land above mentioned. Defendant answered, denying plaintiff's title, and, by way of special defense, alleging (p. 5):

"That said pretended meander line was run or surveyed in the year 1877, and that a new meander line was run through that part of the county in 1895, varying materially in much of its course from that run in 1877, and that neither of them was actually run along or near the margin of said lake anywhere in the vicinity of the tract described in the complaint, but that each of said lines was run a mile or more from the actual margin of said lake, leaving a tract of public land comprising many hundreds of acres, well adapted to agricultural purposes, between said alleged meander lines and the margin of said lake, unsurveyed of which the tract here in controversy is a part; that said lands are in the same general condition, and of the general character that they were when said meander lines were run; that for a long time prior thereto, and ever since there has been as defendant is informed and believes, no appreciable recession of the waters of said lake, nor have there been any appreciable accretions of land along that side of said lake nearest the land in controversy; the lands here claimed are not accretions, nor are they lands made suitable for agriculture by the recession of the waters of said lake since plaintiff acquired title to any of the lands adjoining them or since said surveys."

Issue having been joined, the cause came on for trial in May, 1897. Plaintiff proved its title to the patented land and put in evidence the plat of 1877 (pp. 32 *et seq.*). It also produced evidence tending to show that Lake Mal-

heur had, at the date of that survey, extended as far as the meander line fixed on that plat, and that the water had, from various causes, receded, during the intervening twenty years, to its present stage (pp. 34 *et seq.*). The character and extent of defendant's evidence are thus stated in the opinion of the Supreme Court of the State (p. 54), though the record does not otherwise show such evidence:

"On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at anytime extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots."

At the close of the evidence, the trial court, at the request of the defendant and over the exceptions of the plaintiff, gave to the jury a series of instructions to this effect:

That the government plats were not conclusive evidence that a lake existed north of the land sold to the plaintiff;

That the jury should find for the defendant unless convinced that there "was in reality a lake north of and adjoining said lots" belonging to the plaintiff, no date being fixed as that at which the lake must have washed the lots;

That the verdict must be for the defendant, unless (at sometime not at all indicated), the jury found a lake to have existed "immediately north" of the said lots;

That if the jury found that a swamp or marsh had been "immediately north of and adjoining the said lots," then the verdict must be for the defendant;

That, before the plaintiff could succeed, the jury must be convinced that, on *March 12, 1860*, the date of the swamp land grant to the State, "said lots were bounded on the north by the waters of Malheur lake";

That the verdict must be for the defendant unless the jury were satisfied by a preponderance of the evidence that the lots named "bordered on the meander line," and that "the waters have receded and left the lots described in the complaint * * * as accretions to said land" (pp. 51, 52).

Under these instructions verdict passed for the defendant and judgment was entered thereon. That judgment having been affirmed by the Supreme Court of Oregon, a writ of error brings the case here. The opinion of the appellate court is in the record (p. 52).

Assignment of Errors.

It is submitted that the Supreme Court of Oregon erred:

First. In not reversing the judgment on account of the error of the trial court in giving the following instruction to the jury:

"I instruct you that the fact that there may have been a meander line along the northern boundary of lots 3 and 4 in section 34; and lots 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian is not conclusive evidence of the existence of a lake; you will therefore weigh and consider all the evidence in this case and from the whole evidence determine the fact as to whether or not there was in reality a lake north of and adjoining said lots; and if there was not such lake, you will find for the defendant" (p. 51).

Second. In not reversing the judgment an account of the error of the trial court in giving the following instructions to the jury:

"I instruct you that before you can find for the plaintiff you must be satisfied from a preponderance of the evidence that there was a lake immediately north of lots 2 (3) and 4 in section 34 and 1 and 2 in section 35 township 26 south, range No. 31 E. Willamette meridian; but if you believe from the evidence that there was a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake" (p. 51).

Third. In not reversing the judgment on account of the error in giving the following instruction to the jury:

"The evidence in this case shows that plaintiff was the owner of lots 3 and 4 in section 34 and 1 and 2 in section 35 township 26 south range No. 31 E. Willamette meridian, in this county. This is not the property described in the complaint in this cause; but the plaintiff claims that by reason of the ownership of this property, it also claims the property described in the complaint, and bases its right of recovery in this action upon such right to ownership. In order for plaintiff to recover in this action it must be shown by a preponderance of the evidence that on or about the 12th day of March, 1860, said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant" (p. 52).

Fourth. In not reversing the judgment on account of the error in giving the following instruction to the jury:

"I instruct you that, before you can find for the plaintiff, you must be satisfied, from a preponderance of the evidence, that lots 3 and 4 in section 34, and 1 and 2 in

section 35, township 26 south, range No. 31 E. Willamette meridian, bordered on the meander line. You must also be satisfied, from a preponderance of the evidence, that the waters have receded and left the lots described in the complaint, here in dispute, as accretions to said land, or from which the waters have permanently receded so as to leave them in the condition they are now" (p. 52).

Argument.

I.

The jurisdiction of this court is abundantly established by the following cases:

Cousin v. Blanc, 19 How., 202.
Maguire v. Tyler, 1 Black, 195.
R. R. Co. v. Schurmeier, 7 Wall., 272.
Packer v. Bird, 137 U. S., 661.
Knight v. Land Ass'n, 142 U. S., 161.
Shively v. Bowlby, 152 U. S., 1.
Glasgow v. Baker, 128 U. S., 571.

II.

In that one of the instructions given by the trial court which is set out in our third assignment of error, the jury are told that:

"In order for the plaintiff to recover in this action, it must be shown by a preponderance of the evidence that, on or about the 12th day of March, 1860, [the date of the grant of swamp lands to the State of Oregon], said lots were bounded on the north by the waters of Malheur lake; and if you are not so convinced by a preponderance of the evidence that said lots were so bounded, then you must find for the defendant."

In the next preceding instruction, the jury are told that the plaintiff can not succeed unless, at some date not even

remotely indicated, there was a lake "immediately north" of the lots, and that:

"If you believe from the evidence that there was [no date being fixed] a swamp or marsh instead of said lake immediately north of and adjoining said lots, then you will find for the defendant. In other words, it is a fact for you to determine whether or not that was a lake."

It would be difficult to understand the reference in one of these instructions to the date of the swamp grant, and in the other to a hypothetical strip of swamp land between the meandered boundary of the lots and the actual water line, did not the opinion of the appellate court elucidate the underlying theory of these propositions. From that opinion (p. 57) it appears that the defendant contended that the grant of swamp land is limited to land of that particular character; that it can not be enlarged by accretion attaching to it; and that the present plaintiff, claiming under a patent for swamp land, must be limited to the meandered boundary of the plats, and can not claim the ordinary riparian rights in any accretions.

The instructions go even further than this, and hold that the plaintiff's grantor, the State of Oregon, took under the swamp land grant only land in existence in 1860, and that the title conveyed by the patents to the State must be limited by the water mark as it stood seventeen years before the survey.

While the appellate court does not expressly approve this contention, it does not hold to the contrary, and overlooks the clear error embodied in the instructions, and the affirmance of the judgment by the Supreme Court of the State amounts to an approval of the instructions given and an adoption of the theory upon which they are based.

It is as difficult to perceive what reasons can be urged in support of this novel and extraordinary contention as

it is to find authority for it. The proposition is that a grant of swamp land is of a singular character in this, that while a grant of any other kind of land carries with it as an incident, the right to future accretions, the patentee of swamp land is deprived of that right. It will not be pretended that there is anything in the statute making the grant of swamp lands which suggests any such difference, nor can it be imagined that there is anything in the nature of the case which should deny to the purchaser of swamp lands rights which inhere in the purchase of timber lands, desert lands, or ordinary agricultural lands.

In only a few cases has anything like this proposition been urged, and, in all the cases known to counsel in which the point has been passed upon, it has been held that accretions attaching to swamp land belong to the owner of the swamp land precisely as would be the case if the original purchase were of any other kind of land:

Fillmore v. Jennings, 78 Calif., 634.
Lux v. Haggin, 69 Calif., 255.
The Middle Grounds, 7 Land Dec., 255.

The argument in the court below seems to have been that the grant of swamp land does not carry any land under water; and that, as the grantee of riparian swamp land does not take the abutting lake bed, he can not claim any part of it when left dry and attached to his shore holding.

The riparian owner's right to accretions, however, does not at all depend upon his original ownership of the soil under the adjacent water, since such an owner who bounds upon navigable water becomes entitled to accretions as they appear, although it is settled beyond dispute that his title does not extend beyond the water line:

Gould on Waters, Secs. 149, 155.
Jeffries v. Land Co., 134 U. S., 178.
New Orleans v. United States, 10 Pet., 662.
R. R. Co. v. Illinois, 146 U. S., 387.

And in this case, the water being non-navigable, the grant of shore land does, upon equally well-settled principles, carry title to the lake bed.

That such is the rule in respect to grants of swamp land bordering upon non-navigable water, has been expressly held by this Court, in Mitchell v. Smale, 140 U. S., 413, where it is said:

"Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein, this can not be done."

These instructions were palpably prejudicial to the plaintiff. The jury were told to find for the defendant unless they were satisfied by affirmative proof that the tract sued for was in existence as swamp land and bounded by the lake, at the date of the swamp land grant, seventeen years before the survey. If they believed that the lake had receded in the thirty-seven years intervening between the date of that grant and the trial, they were bound to deny the plaintiff's title to the reliction. For this error it is submitted that the judgment should be reversed.

III.

The four instructions excepted to and assigned as error disregard all the presumptions in plaintiff's favor arising from the official records put in evidence, and cast upon the

plaintiff a burden of proof almost impossible and quite unwarranted by the principles of evidence.

The trial was had nearly twenty years after the survey and more than thirty-seven years after the date of the swamp land grant. Plaintiff had bought in reliance upon the plats of the survey and held under patents referring to those plats and purporting to be an adjudication as the character of the land conveyed. The title asserted rested primarily, if not exclusively, upon these records, and, in the nature of things, could not be supported by very much other evidence.

The instructions excepted to directed the jury to find for the defendant unless they were satisfied by the preponderance of evidence that the plats of survey were correct in representing plaintiff's lots to be bounded by the lake, and this not only at the date of the survey but at a date seventeen years earlier.

While these instructions do not direct the jury to disregard the presumptions in favor of the plats, the reiterated employment of the phrase, "preponderance of evidence," without suggesting any discrimination in favor of the records, did in effect put that class of evidence upon a level with parol testimony, left the entire question as to their correctness to the jury, and must infallibly have led the jury to disregard the well recognized presumptions in favor of the survey and the patents.

These instructions also clearly suggest to the jury that the plats and patents were of themselves insufficient to entitle the plaintiff to a verdict, and direct a verdict to be for the defendant unless the records are corroborated by extraneous evidence deemed satisfactory to the jury.

The vice of such instructions lies, in the first place, in the fact that they ignore all presumptions in favor of official records, and cast the burden of proving their correctness upon the plaintiff, instead of requiring from the

defendant affirmative proof to impeach the records.

These plats were made, in pursuance of statutory requirements, by a public officer, acting under oath and under bond. His work was, under like statutory prescription, reviewed and approved by superior officers, acting under like sanctions. They were made in the interest of the public, intended for public use, and, at the date of the trial, had been before the public and used by the public for nearly twenty years. In such a case, therefore, the plats fall within the rule that every presumption is to be indulged in favor of the public records. As laid down by Mr. Greenleaf, they are—

"Admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the persons on whose authority the truth of the document depends. * * * Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public; and every member of the community may be supposed to be privy to their investigation. On the ground, therefore, of the credit of agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed by the ordinary tests of truth. Besides this, it would always be difficult and often impossible to prove facts of a public nature by actual witnesses upon oath" (Greenleaf on Evid., Sec. 483).

And this court has said:

"In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace and the security of private property, indulges its own presumptions. It presumes that every man, in his

private and official character, does his duty, until the contrary is proved; * * * it will presume that all things are rightly done unless the circumstances of the case overturn this presumption."

Bank of U. S. v. Dandridge, 12 Wheaton, 64.

Of the multitude of cases illustrating these principles, it is worth to cite only two relating specifically to the returns of surveyors:

Galt v. Galloway, 4 Peters, 332.
Gonzales v Ross, 120 U. S., 605.

Upon these authorities it seems clear that it was error to instruct the jury to require of the plaintiff evidence in support of the plats. It is the essence of a presumption that it dispenses with further inquiry (Greenfeaf, Evid., Sec. 14). To seek or demand evidence in corroboration of a return presumed to be true, involves the anomaly of verifying that which itself imports verity, and of confirming that which is itself assumed to strengthen the infirmity of evidence.

If, in any way, the records produced by the plaintiff were open to question, the burden of showing them to be erroneous was certainly upon the defendant; and it was an error, distinctly prejudicial to the plaintiff, to require it to demonstrate the correctness of the plats by a preponderance of evidence.

It is further submitted that these instructions are erroneous in that they permit a collateral impeachment of public records, and leave the correctness of the survey at large to the jury.

The plaintiff's title was acquired after date of the survey and upon faith of the plats. The patents refer to the plats, and purport to convey lands bounded by and extending to the water of Lake Malheur. They are also an adjudica-

tion that the land up to the water line was of swampy character, adopting as they do the representations of the plats, and the rule being settled in this court that the patenting of a tract as swamp land is conclusive as to its character:

Chandler v. Mg. Co., 149 U. S., 79.
French v. Fyan, 93 U. S., 169.
Ehrhardt v. Hogaboom, 115 U. S., 67.

Moreover, the showing made by the plats having been adopted by and incorporated into the patents, any question of the plats is an attack upon the patents. The title of the plaintiff rests upon the survey as much as upon the patents, and it is impossible to impeach the plats without at the same time derogating from the effect of the patents.

The result, therefore, of opening the plats to question is to allow, indirectly, but not the less effectively, the patents to be collaterally impeached, and the plaintiff is deprived of a part of its purchase upon supposed proof of error in the survey, which is not only a part of the patents but their very foundation.

That patents can not be collaterally attacked, is, of course, elementary. Nor can a plat be corrected in this way upon suggestion of fraud or error when a title is passed by it:

Noble v. Logging Co., 147 U. S., 165.
Tubbs v. Wilhort, 138 U. S., 134.

Upon the same elementary principles, it would seem that a direct proceeding should be necessary in order to correct or limit the effect of a patent on account of error in the survey upon which such patent is founded. The patents in this instance, on their face and when read in connection with the plats, conveyed all the public land

up to the line of Lake Malheur: if, by reason of any error or fraud, the survey improperly included or omitted any public land, then the obviously proper mode of correction was a bill in equity putting directly in issue the supposed error or fraud. To allow the apparent purpose and legal effect of the patents to be defeated upon proof of error in the plats, does not differ, in principal or practical result, from canceling the patents in a suit at law.

This is the actual result in the present case. The patentee has been deprived of land which, if the plats are correct, is included in its patents, and this upon the sole ground that the evidence was supposed to show an error in the plats. This is *pro tanto* a defeat of the patents in an action of ejectment.

It is, therefore, submitted that the trial court erred in leaving the correctness of the plats and the effect of the patents to the jury in this proceeding, and for that reason the judgment should be reversed.

IV.

The instructions of the trial court are erroneous for the further reason that they make the plaintiff's title to the land conditional upon proof that the meandered boundary of the patented lots coincided precisely with the actual water line.

In the first instruction assigned as error the jury are told that the verdict must be for the defendant unless the plaintiff has proved that, "there was in reality a lake north of *and adjoining* said lots."

In the next instruction a verdict for the defendant is directed unless the jury are satisfied, by "a preponderance of the evidence, that there was a lake *immediately north* of" the lots patented to the plaintiff; and that the defendant is entitled to a verdict if the jury believe "that there was a swamp or marsh, instead of said lake, *imme-*

diately north of and adjoining said lots. In other words, it is a fact for you to determine whether or not that was a lake."

In the third instruction the jury are told that it must appear, by a preponderance of evidence, that, at the date of the swamp land grant, seventeen years before the survey, "said lots *were bounded* on the north *by the waters* of Malheur lake."

In the following instruction the jury are directed to find for the defendant unless satisfied that, at some date not even remotely indicated, the lots "bordered on the meander line," and that the entire body of land sued for has been left by recession of the waters as an accretion to the patented lots.

The evident purpose, and the inevitable effect, of these instructions was to inculcate upon the jury the necessity of absolute accuracy in the survey, and to impress them with the idea that the plaintiff was not entitled to any accretion or other riparian rights unless the surveyor's meander line coincided exactly with the actual water line. If the jury believed that, by accident, oversight or negligence, the surveyor had, at any point, left a strip of land between the location of his meander and the margin of the lake, then they must deny the title of the plaintiff.

In the second instruction, this is specifically stated. The jury are told that, if the surveyor left a strip of swamp or marsh unsurveyed, between his meander and the water, then that omitted strip remained public land, and its omission from the survey would confine the purchaser of the meandered lots to the metes and bounds indicated by the meander line. Inasmuch as the plats represented the swamp land up to the water's edge as being included in the lots, and the patents were, upon authorities already cited, an adjudication that the lots included all the swamp land up to that point, the jury were precluded from finding the

existence of an unsurveyed strip of swamp land between the lots and the water.

Independently of this, however, this and the other instructions are palpably erroneous in that they proceed upon the theory that the meander line, and not the water, is the boundary. The jury are allowed to find a variation between the water line and the meander, and, in that case, to return a verdict against the plaintiff. This is upon the principle that, if for any reason, or by any accident, a surveyor neglects to run his side lines to the actual margin of the water, or fails to lay his meander line precisely upon the water's edge, in that case a purchaser, buying the lots represented as extending to the water, will be limited to the lines actually run by the surveyor.

It will be observed that no limits as to the extent or gravity of the surveyor's error are indicated in the instructions. Whether the jury believed that the water lay only six inches or six miles from the meander line, they were equally, in either case, bound to find against the plaintiff.

That the theory underlying these instructions is erroneous, is too well settled to admit of argument. The meander line is not run as a boundary, but only to indicate the sinuosities of the bank and to assist in the computation of area:

Schurmeier v. R. R. Co., 7 Wall., 272.
Gould on Waters, Sec. 78.

The boundary is the water, wherever that may be and without regard to its distance from the meander line fixed by the surveyor:

Schurmeier v. R. R. Co., *supra.*
Bates v. R. R. Co., 1 Black, 204.
Newsom v. Pryor, 7 Wheaton, 7.

Hardin v. Jordan, 140 U. S., 371.
Mitchell v. Smale, 140 U. S., 406.

When a survey or a patent shows a body of water to be one of the boundaries of a tract of land, it is a legal deduction that there is no vacant land left between the water and such tract:

St. Clair Co. v. Lovingston, 23 Wall., 46, 63.
Gould on Waters, Sec. 194.

With respect to lakes, ponds, and other bodies of water not running streams, the same rules apply. Patents of the United States bounding on such waters are not limited by the meander lines, but carry title to the actual water line:

Hardin v. Jordan, *supra.*
Gould on Waters, Sec. 203.
Fuller v. Dauphin, 124 Ill., 542.
Clute v. Michigan, 65 Mich., 48.
Boorman v. Sumachs, 42 Wisc., 233.
Kraut v. Crawford, 18 Iowa, 550.
Poynter v. Chipman, 8 Utah, 442.

The same rule has obtained in Oregon:

Minto v. Delaney, 7 Oregon, 337.
Weiss v. Oregon Co., 13 Oregon, 496.

And is thus enacted in one of the statutes of that State:

"Where permanent and visible or ascertained boundaries or monuments are inconsistent with the measurements, either of lines, angles or surfaces, the boundaries or monuments are paramount."

Oregon Code, Sec. 845, Subd. 2.

The instructions excepted to clearly made it impossible for the jury to apply the correct rule to the facts. The trial court laid repeated stress upon its own erroneous rule that the meander line must coincide exactly with the existing water line and impressed upon the jury the necessity of an actual physical contiguity between the water of the lake and the boundary of the lots as defined by the surveyor's courses and distances. The jury were bound to deny the plaintiff's right to the accretion if they found any, even the most inconsiderable, discrepancy between the water line reported by the surveyor and the actual margin of the lake. They were told that they could not find for the plaintiff except upon affirmative proof that the water of the lake was "adjoining said lots," and "immediately north of and adjoining said lots," and that the lots were actually "bounded by the waters of Malheur lake," and that the lots actually "bordered on the meander line," that is the margin of the water as fixed by the surveyor. The jury were instructed to find for the defendant if they believed that any strip of swamp or marsh land was left by the surveyor between his meander line and the actual water of the lake.

The opinion of the appellate court (p. 57) shows that such was the view of the trial court and that this view was approved on appeal. The opinion reads:

"If there never was a lake in front of plaintiff's lots or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of said lots; hence resort must be had to the secondary evidence, viz: the courses and distances, which are ascertainable from the plats and surveys, and they must prevail. The result is natural and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line."

The authorities above cited show the error of this view. The theory of the appellate court, that the patentee's title may be limited by the sectional lines of survey, is specifically disapproved in Hardin v. Jordan, 140 U. S., 398. The "natural result," at which the opinion arrives, is that the patentee, who buys in reliance upon the Government's representation of a water frontage, finds himself limited to the lines fixed by the surveyor if, after twenty years, a jury can be induced to suspect that the surveyor did not actually run his lines to the very edge of the water.

It is accordingly admitted that the judgment should be reversed for this error in the instructions.

V.

The Supreme Court of Oregon, while not denying the general principles herein contended for, distinguishes the present case on the ground that Lake Malheur, at the date of the survey, lay so far distant from the plaintiff's lots as to preclude any claim of riparian purchase.

This, at least, is counsel's understanding of the meaning of the opinion. The court, in one passage, seems to concede that the lake existed, but in another (p. 57) assumes that the defendant had established the contention, "that there never existed a lake in front of or bordering upon the plaintiff's lots; that the question involved is not one of accretion or recession of the water, and consequent reliction, but of the existence of the lake upon which plaintiff anchors its claim; that this question was submitted to the jury, and, as the verdict was against the plaintiff, it is now precluded."

It appears, from the same opinion, that the defendant, while admitting the existence of Lake Malheur, had given evidence tending to show that it lay to the northeast of

plaintiff's lots, but at what distance is not mentioned (p. 58).

Assuming that defendant had proved the existence of the lake at some distance from the land surveyed, the court holds the instructions given below to have been correct, apparently regarding the distance or direction of the water as making this a case of exceptional character.

It may, in the first place, be objected that the record before this court does not embody any of the evidence to which the Supreme Court of Oregon refers as excepting this case from what is conceded to be the general rule in the construction of patents based upon public surveys. The bill of exceptions does not show that the lake lay at any extraordinary distance from the land surveyed, or that any evidence to that effect was given. If any such evidence was produced at the trial, the defendant, in order to avail himself of the exceptional state of facts supposed to exist, should have made it appear in the record. If the court below proceeded upon any such proof, this court is confined to the regular record, and resort can not be had to the opinion of the court below for information as to the character of the case made in that court:

> Stone v. United States, 164 U. S., 380.
> Lehnen v. Dickson, 148 U. S., 71.

In the second place, the instructions excepted to do not embody the doctrine approved by the appellate court. There may have been evidence tending to prove the nonexistence of Lake Malheur or to prove that the lake was several miles distant from the land; and it might be conceded that instructions applicable to that kind of evidence would have been unexceptionable. But the instructions complained of go much further and made it possible for defendant to prevail, or rather made it impossible for him

to fail, upon a much less extreme state of facts than is assumed in the opinion of the appellate court. Had the trial court told the jury to find for the defendant if they believed that Lake Malheur was ten miles, or one mile, or even a hundred yards, distant from the lots, a different question might have been presented. But, under the instructions given, they were obliged to find for him if they found the slightest discrepancy between the survey and the physical facts. The fact that the evidence may have warranted sound instructions does not cure the error of giving instructions which were unsound. The jury may not have believed the evidence tending to prove the extraordinary remoteness of the water, or supposed to establish the other facts held to make this an exceptional case. But they were required to find for the defendant upon a state of facts which concededly would not except this case from the general rule, and the plaintiff was defeated because it failed to prove affirmatively the absolute accuracy of the survey.

A third objection to the adoption of the view taken by the two courts below is that the defendant did not, in his plea or elsewhere in the record, lay the foundation for the defense which is supposed to except this case from the general rule applicable to riparian purchases. The existence of Lake Malheur is expressly admitted in the plea. It is not denied that the land is represented on the plats as bounded by that lake. Nor is it alleged that the lake lay at any such great distance, or in such a direction, from the land as would warrant a finding, as the appellate court phrases it, that "there was no lake to meander," and justify the conclusion that "the purchaser could not have bought upon the representation of the Government that there was."

Unless the defendant had set up some defense which would let in proof of some such extreme and extraordinary

state of facts as the opinion of the appellate court assumes, it was error to allow the jury to find such conditions, and error to affirm a judgment which required for its support the non-existence of the lake.

For these reasons it is conceived to be unnecessary to inquire how far the case presented to the court below involved such extraordinary conditions as might except it from what is conceded to be the general rule applicable to errors in public surveys. As the record does not, and properly could not, present anything more serious than a discrepancy between the meander line and the water line, the judgment should be reversed because the trial court misdirected the jury as to the law applicable to such a case.

VI.

Assuming that this record presents such a case as the Supreme Court of Oregon states, it is submitted that the doctrine held by that court is erroneous.

As before stated, it is extremely difficult to make out just what state of facts was supposed by the courts below to exist. The instructions of the trial court apply to the most inconsiderable discrepancy between the meander line fixed by the surveyor and the actual water line. The opinion of the appellate court seems to assume, sometimes, that there was no lake at all; in other places, that the lake was so far away from the land that it could support no claim of riparian rights; and, again, it is said that, "the pivotal question before the jury, as we have seen, was whether a lake existed in front of these lots" (p. 59).

Perhaps the conception of the facts and of the law held by the Supreme Court of Oregon is most accurately indicated by a passage quoted with approval from the opinion of another court:

"But there is no evidence that, at or near the time of the survey, or since, there has been any body of water *anywhere on the land*, upon which to base a meandered line" (p. 57).

Judging from the instructions given by the trial court, it would seem that both tribunals below held to this narrow view, and considered that the plaintiff must fail because it had failed to prove that the water was actually upon or contiguous to the land.

The opinion below may be considered most favorably, and the case may be conceived most advantageously to the defendant, by assuming that the allegations of the plea were sustained by the evidence. It is to be presumed that the defendant stated the case as much as possible in his own favor, and he could certainly have proved nothing more than he alleged.

The plea sets up, simply, that the meander line of 1877 was laid "a mile or more" from the actual water line then existing, leaving a belt of unsurveyed land between the lake and the surveyor's meander, and that the land sued for is not, to any appreciable extent, the result of subsequent reliction (p. 5, quoted above).

Taking the case at its best for the defendant, this averment marks the limit of his possible proof. The question, then, is, whether, upon proof of the state of facts alleged, the instructions of the trial court were correct.

The existence of Lake Malheur is admitted. More than this, it is admitted that the lake lies at no enormous distance from the land, but within a mile, or a little more, of the surveyor's meander. The plea shows also that the lake was platted as extending to the plaintiff's land, and it is not denied that the patented lots were represented as bounded by the water. It is not suggested that the surveyor was guilty of any fraud, nor is even any gross neg-

ligence averred. And there is no pretense, either in the plea, or elsewhere in the record, or even in the opinion, that the plaintiff was implicated in any possible fraud, or took with any knowledge or notice of the alleged discrepancy between the showing of the plats and the actual facts.

It is therefore the case of an entirely innocent purchaser who has bought land upon the faith of an official survey held out by the Government for the guidance of the public. And the question is, whether such a purchaser may be deprived of the water frontage guaranteed to him by the Government, upon proof of an error in the survey made twenty years ago.

Stated in this form, the authorities already cited admit of only a negative answer. The only ground upon which this case is sought to be taken from the general rule is the alleged fact that the error in the survey amounts to a discrepancy of about a mile between the meander line and the actual margin of the water.

It is only by assuming that the allegation of the plea was established that the question can be reduced to this form. The instructions of the trial court do not suggest that any such discrepancy was proved or needed to be proved. The opinion of the appellate court does not put the decision on the ground that the lake was a mile away from the land, but rather makes it material that there was no lake "in front of" of the lots, or that there was no "body of water anywhere on the land, on which to base a meandered line." But let it be assumed, for the sake of developing the supposed exceptional character of the case, that the actual distance of the water from the land was one mile.

It is not perceived how, upon principle, the extent of the discrepancy between the survey and the facts could affect the general rule. The principle, that fixed monu-

ments shall control course and distance, rests upon two considerations; first, that there is less likely to be error in a call for a natural object than in a call for an imaginary point; and, second, that the purchaser relies rather upon the representations of his plats and patents as to natural objects than upon the surveyor's measurements. These considerations operate as effectively where the error is great as where it is small. In the present case, the plaintiff, it may be presumed, looked to the lake to define the location of its land and not to the surveyor's courses; and it can scarcely be doubted that the Government's assurance of a water frontage was a more persuasive inducement to the purchase than any facts to be deduced from the mathematics of the field notes.

Now, whether the supposed error in the plats was great or small, the injustice done to the purchaser who bought in reliance upon the plats, would be equally real if his grant should be curtailed by reason of the negligence or fraud of the Government's officers. In this case, the plaintiff's title is not acquired under any law, such as the homestead law, which requires of the purchaser personal acquaintance with the land purchased, but under patents which were an adjudication that the whole tract, up to the water's edge, was swamp land. No rule of law required the State of Oregon, or its vendees, at their peril, to ascertain the character of the land. Still less were they required to verify the work of the public surveyors, lest some error should creep into the official calculations, or to make perambulation of the land and ascertain that every measurement had been correctly made, that every post had been correctly set, and that the water stood exactly where the Government officers reported it. The purchaser was not bound to push his inquiry back of the plats, to investigate the process of their making, and to hazard his money upon questions settled by their official

approval and authoritative publication to the world. The State and her vendees were entitled to assume that the deputy surveyor did his full duty; that the Surveyor-General made the proper inquiries and full revision of the field work; that the Commissioner of the General Land Office did not approve the plat unadvisedly or inconsiderately; that the plat itself, like a patent, is conclusive evidence that every fact legally requisite to its issue had been duly ascertained, and that every return upon which the validity of the survey depended had been duly verified. These purchasers were entitled to place upon the plats such credit as was due to the stringent legal guaranties of their correctness and to the high authority of their official sponsors. If, in spite of the severe scrutiny under which surveys must pass, and in spite of all the inquisitorial agencies of the Government, errors had crept into these plats, it would be too much to expect that any mere private individual should detect them, and too much to hold that such an individual should suffer because of the negligence of public officers.

The title of the plaintiff in error was acquired in 1894, seventeen years after the survey. Coming upon the land at that date, if it had appeared that the water was a mile from the meander line, the plaintiff might well have attributed the discrepancy to reliction. Even had there been a suspicion of fraud or negligence in the survey, the intending purchaser could not have remedied it, and the only way in which he could obtain the desired water frontage was to buy the land that was represented to lie upon the lake. It was not his duty to detect a possible error in the survey, nor, having detected it, could he disregard the record of the survey.

Whether the discrepancy between the survey be great or small, the same considerations apply, and, as a practical consideration, it would be impossible to fix any limit,

beyond which the general rule shall not apply and the purchaser shall be held responsible for the error in the survey. Neither of the courts which have considered this case has undertaken to indicate how gross must be the surveyor's error to constitute the case an exception to the ordinary rule, and no authority known to counsel suggests any such limit. In the present case, it seems to have been left to the jury to determine whether, in their opinion, the error of the survey was great enough to impeach the records and to curtail the effect of the patents. It is obvious that this can not be a satisfactory method. One jury may require a very gross discrepancy, while another would deny riparian rights on account of a very trifling error, and land titles depending upon water boundaries would be as unstable as the water itself.

Upon authority, it is conceived to be not less well settled that public surveys are not open to question and correction as against those who have purchased in reliance upon such surveys. Even where the surveyor's error was one of law, being the division of a section in violation of the statute, it was held by this court that the error could not be rectified to the prejudice of the Government's vendee:

> Gazzam v. Phillips, 20 How., 372.
> Overruling Brown v. Clements, 3 How., 650.

So where the purchaser was shown by a corrective survey to have built his house outside the tract bought by him, the Government was held bound by the original survey:

> Lindsay v. Hawes, 2 Black, 554.

With respect to riparian rights, as dependent upon public surveys, this court and other Federal courts have al-

ways held that errors in the surveys would not prejudice the right of a riparian grantee to hold to the actual water line. The authorities already cited establish this doctrine, and they are all cases of more or less grave discrepancies between the plats and the physical facts. Thus, in Schurmeier v. R. R. Co., the survey had omitted an island of 2.78 acres from a subdivision of only 9.28 acres, and the purchaser obtained about one-third more land than he had paid for. In Hardin v. Jordan and Mitchell v. Smale, *supra*, there was an ascertained omission of a considerable area from the survey.

And in such cases, it is well settled that the public is bound by the surveys of the Government, even where gross and apparent errors exist in the surveys. The principle is, that the Government, as owner of the land, has the right to determine its boundaries and subdivisions, and all persons dealing with the land are bound by this official determination. In Bates v. R. R. Co., 1 Black, 204, attempt was made to impeach a public plat by showing that the Chicago River, which was platted as flowing in one direction, did, at the date of the survey, flow in another. This court said:

"It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of water only temporary at particular times. * * * The public had the option to declare the true mouth of the river for the purposes of a survey and sale of the public land."

The same doctrine is thus laid down in Mann v. Tacoma Land Co., 44 Fed. Rep., 27:

"The work of the surveyors in the field, with their plats and field-notes, has been approved by the Commissioner of the General Land Office, and it is, as to all matters relating to the sale and disposition of lands of the

United States, conclusive and binding upon all persons having to deal with the United States, as well as upon the Government itself."

The few cases which, more or less distinctly, hold that the riparian purchaser may have his grant impaired by proof of the surveyor's omission of land, may be briefly noticed.

Granger v. Swart, Woolworth, 88, was a *nisi prius* case in a circuit court prior to the date of the Schurmeier case, and can not be considered an authority in view of the rule established by the case in this court.

Lammers v. Nissen, 4 Nebraska, 245, and Fuller v. Shedd, 161 Ill., 462, may be taken to settle for the States of Nebraska and Illinois a different rule from that which prevails generally and in Federal courts. The Nebraska case is prior in date to Hardin v. Jordan, and would probably not now be followed in that State. Fuller v. Shedd seems avowedly to repudiate the doctrine laid down by this court, in Hardin v. Jordan, and applied to the same or neighboring land.

Grant v. Hemphill, 92 Iowa, 218, the case cited and chiefly relied upon by the Supreme Court of Oregon in this case, can, at the best, do no more than establish for the State of Iowa a rule which is contrary to that generally prevailing. That case might be distinguished on its facts from this, but such an examination is not worth while in view of later cases in the same State which appear to discredit it. In Schlosser v. Cruikshank, 96 Iowa, 414, it was held that the omission of a considerable body of land from a survey would not defeat the riparian rights of one who had purchased land represented as extending to the water; and in Rood v. Wallace, 79 N. W. Rep., 449, the same court went still farther in the same direction.

Glenn v. Jeffrey, 75 Iowa, 20, and Horne v. Smith, 159 U. S., 40, do not affect the general rule contended for. Both were cases in which the grants were held to extend to bodies of water, and the only effect of either case is to establish the rule that a grant bounded by water can not be extended to reach another and more distant body of water.

Niles v. Cedar Point Club, 175 U. S., 300, was a case in which the survey was represented as closing upon a marsh, and not upon any body of water. The plat, therefore, afforded no ground for a claim of riparian ownership, and the decision does not touch the present question.

In Mitchell v. Smale, *supra*, this court, while deciding that a riparian purchaser is entitled to claim to the edge of the water, intimate that there may be cases of plain and obvious mistake or of gross fraud on the part of the surveyor in which the Government may "have the right to recall the survey, and have it corrected by the courts or in some other way." To understand this passage as indicating that an innocent purchaser may be prejudiced by such errors or that the right of correction may be exercised so as to curtail or defeat his grant, would be contrary, not only to the uniform course of decision in this court, but to the effect of the decision in that very case.

The true rule, as counsel understands it, is that an error in a survey may be corrected before the approval of the plats, or afterwards so that no rights acquired on faith of the plats be prejudiced. But, to say that an error may be corrected at the expense of an innocent purchaser would be contrary to natural justice, and in the face of positive declarations of this court.

The rule is thus laid down in Cragin v. Powell, 128 U. S., 699:

"It is conceded that the power of supervision and correction by the Commissioner of the General Land Office

is subject to necessary and decided limitations. Nor is doubted that, when the Land Department has once made and approved a governmental survey of public lands (the maps, plats, field-notes and certificates all having been deposited in the proper office), and has sold or disposed of such lands, the courts have power to protect the private rights of the party who has purchased in good faith from the Government against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale."

In Mitchell v. Smale, 140 U. S., 412, where the surveyor had left a considerable body of land between his meander line and the water, it was said:

"We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned."

Attention is particularly invited to two cases in which the extent of the surveyor's error was as great as is alleged and could have been proved in the present case.

Kirwan v. Murphy, 49 U. S. App., 658, was a case in which the surveyor had omitted from survey a tract, between the water and his meander line, about a mile wide and covered with trees much older than the survey, the area being so great and so disproportionate to the extent of the whole survey as to suggest gross fraud. But the Government had sold the land according to the plats, and

the Land Department was enjoined from making a resurvey. The court held it immaterial that the land involved was shown not to have been formed by accretion or reliction, saying:

"It is contended by the appellants in this case that the lands between the meander line as shown on the plat and the actual waters of the lake is not accretion or reliction, and therefore that the authorities above cited have no application, and that the title to the land did not pass by the patent; that it is not a question of riparian rights since the lake was the same at the time of the survey as it is now. We think this can make no difference, as the plat of survey returned to the general and local land offices and referred to in the patent for identification of the land, exhibited the granted tracts as actually bordering on the lake. * * * The fundamental right of riparian ownership consists in the right of access to the water, and it is in order to make that right available and complete that the doctrine is appiled to cases of accretion and reliction; but the same principle underlying these cases, namely, the right of access to the water, is equally applicable to the case at bar."

In Newsom v. Pryor, 7 Wheaton, 7, was presented a case of palpable and conceded fraud on the part of the surveyor. The field-notes showed side lines running to the water, which was called for at a distance of 894 poles, while the fact was that the course indicated fell short of the water by 328 poles, more than a mile. The result was that the grantee, under a patent for 5,000 acres, obtained about 1,800 acres additional, an increment of nearly 40 per cent. Mr. Chief Justice Marshall, in an opinion sustaining the purchaser's claim to extend to the water, said:

"It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a plat which he supposed would comprehend the land intended to be acquired. It is now too

late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle can not be perceived, and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had actually been made."

It is, accordingly, submitted that the extent of the discrepancy between the representations of the plats and the actual facts is immaterial, and that, even in a case of error as gross as could possibly exist in the present, the public are bound, as against purchasers, by the public survey. As the Supreme Court of Oregon states in its opinion (p. 56):

"The real question of cardinal and pivotal concern arises upon the urgent and strong contention and argument of counsel for plaintiff, that the official survey of the lake, the approval thereof, and the official plats and maps made thereunder, showing the lake and the meander line thereof, conclusively establish the fact and location of the lake, and the Government and its grantees are estopped to deny the supposed facts as represented to the purchasers of abutting land. Mann v. Tacoma Land Co., 44 Fed., 27, supports this contention in its fullest signification; and Mitchell v. Smale, *supra*, may be said to sustain it."

As the decision below is thus avowedly in opposition to the doctrine of this and other Federal courts, it would seem on its face to invite reversal. And in view of the other considerations herein mentioned, it is submitted that the judgment should be reversed.

CHARLES A. KEIGWIN,
Attorney for Plaintiff in Error.

No. 124.

Motion as to Costs.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE FRENCH GLENN LIVESTOCK COMPANY,
Plaintiff in Error,
vs.
ALVA SPRINGER, *Defendant in Error.*
} No. 124.

Motion for an Order in Regard to Taxation of Costs.

CHARLES A. KEIGWIN,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, 420 & 422 9TH ST., WASH., D. C.

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Now comes the above-named plaintiff in error, by its attorney, and moves the court to authorize and direct the clerk to print the record filed in this cause upon the payment by the plaintiff in error of the costs and fees calculated upon only such portion of the said record as is to be printed.

It appears that the record as filed in this court consists of 106 pages of matter properly included and which should be printed, to which has been added, through the oversight or error of counsel or of the clerk of the court below, nearly 700 pages, which include a stenographic report of

the testimony and other proceedings at the trial, together with divers maps and other exhibits. All of this added matter is unnecessary and unavailable for any purpose, and the parties have stipulated that it shall not be printed.

The clerk of this court considers it his duty, under the last clause of Rule 10, to require the plaintiff in error to pay the regular fee for supervision of this portion of the record, though the stipulation above-mentioned makes it unnecessary and impossible for him to perform any service in relation to the 700 pages thereby eliminated. The fee, calculated under the rule, for such supervision of unprinted matter amounts to $355, which is more than three times the fee for actual supervision.

It is not intended to question the correctness of the interpretation put upon Rule 10 by the clerk; but it is submitted that, in this instance, such interpretation works a hardship entirely out of proportion to the proper value of the clerk's service and such as is not within the contemplation of the rule.

It is therefore prayed that, in view of the exceptional character of the case and the peculiar circumstances under which the hardship has been cast upon the plaintiff in error, the court will authorize the clerk to print the record upon the payment of the fees properly calculable upon that portion of the record which he is required to print, and thereby relieve the plaintiff in error of an unearned and unnecessary fee.

CHARLES A. KEIGWIN,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

NO. 124.

THE FRENCH-GLENN LIVE STOCK CO.,
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DEFENDANT'S BRIEF.

Statement of the Case.

This is an action in ejectment. In April, 1877, a government survey was made of certain lands in Harney County, in the State of Oregon, and a meander line was established around what is called on the maps and plats, Malheur Lake. That survey also established the lines of the lots hereinafter described. In 1889 the plaintiff's grantor purchased from the State a small tract of swamp land described as lot 3, of section 34, and in 1890 another tract of the same kind of land known as lot 4, in section 34, and lots 1 and 2, in section 35. These lots lie just outside this meander line as located along the south side of Malheur Lake, as it appears on the maps and plats, and immediately north of them, inside of the meander line, is the property in question in this case.

These lots were patented to the State as swamp land, after plaintiff's grantors had purchased them from the State. That purchased in 1889 was patented in 1890, and that purchased in 1890 was patented in 1895. The defendant went upon the land involved about nine years before this action was begun, fenced it in, built a small house, and has made it his home ever since.

The plaintiff, being thus the owner of these few acres, lying as a narrow strip along the meander line, by virtue of that ownership claims title to all the land in front of its possessions, inside the meander line, to the centre of a lake as represented on the maps and plats made from the survey of 1877, as above referred to, and under that claim brings this action.

The plaintiff, after introducing its muniments of title—the government survey, showing the location of the meander line, and the government maps and plats, showing Malheur lake, as if bounded by the meander line and covering the land in question—introduced oral evidence for the purpose of showing that in 1877 the lake was, in fact, as represented on the maps and plats, and that since that time the water had receded, exposing the land in controversy. The defendant introduced evidence showing that there was no lake in front of the plaintiff's land, and never had been; that at most a part of it was but a swamp during a part of the year, and the remainder was hay land, and that all of it was sometimes temporarily covered with water during the spring thaw or in times of unusual high water; that Malhuer lake was away off, a mile and a half or two miles to the northeast, *and that if the east and west lines of plaintiff's land were extended indefinitely neither of them would come within a mile and a*

half of the lake. The case was submitted to the jury upon the issue of fact *as to whether there was any lake* in front of plaintiff's lots; the jury found there was *not*, and returned a verdict for the defendant.

The case went to the Supreme Court of the State of Oregon on a bill of exceptions (p. 14 *et seq.* of the Record) taken by plaintiff and was decided in favor of this defendant, on the ground that if there was no lake at all which could be the natural boundary, then resort must be had to the meander line as evidence of what was the boundary, and that the government and its grantees could not because of a represented meander line be precluded from showing that there was in fact no lake whatever, and that, therefore, the question of lake or no lake was properly submitted to the jury, and the jury's finding of fact was conclusive (pp. 55–57 *et seq.*, Record).

The case comes here on writ of error. The errors assigned will be found on page 62 of the Record.

ARGUMENT.

I.

This Court has no jurisdiction.

II.

The maps and plats introduced in evidence are not conclusive as to the existence or non-existence of a lake in front of the plaintiff's lots as shown by them.

III.

The instructions given by the trial Court were fair and without error.

I.

WE THINK THE COURT IS WITHOUT JURISDICTION, BECAUSE, UNDER THE PLAIN LANGUAGE OF THE JUDICIARY ACT AND, AS WE UNDERSTAND ITS INTERPRETATION BY THIS COURT, THE RECORD DOES NOT SHOW THAT THE VALIDITY OF ANY FEDERAL LAW OR DEED WAS DRAWN IN QUESTION.

Plaintiff's title originates in the Swamp Land Act of 1860. That is a Federal act, but its validity, construction and interpretation are not drawn in question. We admit its full force and effect.

The evidence of its title are the United States patent to the State in conformity with the granting act and a deed from the State of Oregon.

The first is a Federal muniment of title; but it is not disputed, no interpretation of it is asked. Its validity is in no way whatever drawn in question.

An incident of this patent is the plat or survey, showing a certain meander line.

This meander line is not disputed or in any way attacked, its *validity* is not drawn in question.

What is drawn in question? It is whether or not there was at the time of grant or survey a lake, forming part of a boundary line, as shown by the plat. This goes not to interference with plaintiff's title, as

shown by the plat. His title by the plat is admitted. But we object to his going beyond the meander line, as platted, in order to take in exterior lands, which, if there had been a lake as platted, he might be entitled to, but there being no lake as platted, he is not entitled to. The whole question is one of disputed boundary and is a question of fact for the jury. *If* there was a lake as platted, the instructions of the *nisi prius* Court and the decision of the Supreme Court of Oregon give the disputed land to the plaintiff, following the decisions of this Court.

If this decision draws in question the VALIDITY of any Federal Constitution, Statute or Act, then, as was said by this Court in Moreland vs. Page (post), every case of land title, which anywhere touches a question of Federal survey or boundary, will be appealable to this Court. To us it seems a mere question of boundary or survey. Within the spirit of the Judiciary Act, no Federal question is involved, no right founded in federal authority is invaded.

The act of Congress is not disputed, nor the patent, nor the right to make the survey, nor the conclusiveness of the survey, nor the validity of title; only in settling a disputed boundary, it becomes necessary to show error in the survey. We await the decision of this Court as to whether that is a Federal question.

Lanfear vs. Hunley, 4 Wall., 204.
Moreland vs. Page, 20 How., 522.
Barbarie vs. Mobile, 9 How., 451.
Almonester vs. Kenton, 9 How., 1.

The decision here complained of was made in accordance with the rules of general jurisprudence.

City of New Orleans vs. New Orleans Water Works Co., 142 U. S., 79.

It is apparent from the pleadings and such evidence as is quoted in the bill of exceptions that plaintiff had the very land in question pointed out to him and recommended as an available site by Peter French, president of the plaintiff. The jury may have decided the case upon this ground, although it is not clear from such of the evidence as is given whether plaintiff had title to lots 3 and 4 when the acts set up as estoppel occurred. The rule is well settled that even though a Federal question is involved, if the decision might have passed off on other grounds, this Court will not review it (see pp. 5, 17, and bottom line, p. 50, of the Record).

II.

THE MAPS AND PLATS INTRODUCED IN EVIDENCE ARE NOT CONCLUSIVE AS TO THE EXISTENCE OR NON-EXISTENCE OF A LAKE IN FRONT OF PLAINTIFF'S LOT.

The general rule, as we understand it, is:

1st. Neither the Government nor its grantees can ordinarily dispute its own maps and plats to the injury of a *bona fide* purchaser who relied upon them.

2d. A meander line is a surveyor's average line with respect to the sinuosities of the natural water line drawn as a basis of measurement of the quantity of upland contained in a lot bounded by a body of water. When there exists the body of water assumed to exist

by the fact that a meander line has been delineated on the surveyor's map this body of water or its centre is the boundary of the land, both upland and water-bed, which is contained in the riparian lot. But when there does not exist the body of water assumed to exist there is no water-bed land which can be included in the supposed riparian lot.

But existence or non-existence is very different from variation. Had there been a lake in front of these lots of plaintiff at the time of the survey, which lake had receded from the platted meander line, or which meander line had been carelessly run a mile from the water's edge, there would be room for discussion as to how far the Government ought to be bound as against its grantee, or how far the grossness of mistake or vast extent of added area ought to be considered. But, if there *never* was any lake at all, then there is nothing upon which to base interpretation or discussion. There is no *locus* upon which to fasten any meander line. No water to become the actual and visible monument. No injury is done to the vendee in not being allowed to go to that which does not exist. Every reason for maintaining the integrity of the plat having failed, no Court is going to insist upon a blind and obstinate enlargement of the rule. If it did so the rule would be injustice, not justice.

There being no lake opposite the lot as delineated are the rectilinear sides of the lot to be prolonged indefinitely until, perchance, they strike a lake? Such a proposition is absurd.

Is the lot to be moved laterally, as it were, till it is opposite a lake? The very question is absurd.

Is a lake to be excavated as outlined on the plat? This suggestion is also absurd.

Is the meander line as platted to be accepted as the boundary? There being no lake—in fact, no actual water to resort to as the better monument—the meander line as platted seems the only resort, and this conclusion seems the only rational one. This was the conclusion of the lower and Supreme Courts of Oregon. The verdict of the jury settles the fact that at the time of the grant, and of the survey, and now, there was and is no lake as platted. That so far as man can tell there never was a lake in that region which would be intersected by the projection of the rectilinear sides of plaintiff's lot. Therefore, as there is not and never was a lake in fact, the purchaser of the lot is limited to its platted boundaries, including the meander line as delineated.

The following cases seem to us to bear out the foregoing:

Niles vs. Cedar Point Club, 175 U. S., 300.
Horne vs. Smith, 159 U. S., 40.
County of Cook vs. Calumet, etc., 138 U. S., 635.
Hamilton Bridge Co. vs. Illinois, 175 U. S., 633.
Telluride Power Co. vs. Rio Grande, etc., 175 U. S., 639.
Hammond vs. Johnson, 142 U. S., 73.

III.

THE INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE FAIR AND WITHOUT ERROR.

Unless the jury was wrongly instructed, its verdict is conclusive that there was no lake at the time of the survey. The instructions, examined as a whole, are very fair, and indicate that the plaintiff could have had any instruction as to clear and settled law which it might have requested. It will be remembered that all that is shown here of the evidence and the Court's charge is by the plaintiff's own bill of exceptions. The instructions begin on page 48 of the record, and may be summarized as follows :

1st. The principal question for decision is the fact whether the defendant's lands were accretions to the plaintiff's adjoining lands.

2d. Sets out the Swamp Land Act and its effect, and that no definite tract passed to the State till approved by the Secretary of the Interior.

3d. That if plaintiff's lot abutted on the lake and it was unnavigable, then his ownership extended to the centre of the lake.

4th. That the owner of a lot delineated on a field and approved plot abutting on a non-navigable lake is entitled to all accretions by deposit or receding, even to the centre of the lake.

5th. No difference how accretion is made—naturally, artificially, suddenly or gradually.

6th. Survey plat is conclusive as to the meander line.

7th. Government has a right to declare and fix the place of the lake for purposes of survey and sale of land, and after rights have intervened such survey and plat cannot be disputed.

8th. Meander lines are not the real boundaries. The channel of the river or centre of the lake is the real boundary.

9th. Cannot question a United States patent collaterally.

10th. If plaintiff was the owner of lots 3 and 4 on south side of Malheur Lake, defendant could no more rightfully detain the land in controversy than he could lots 3 and 4.

11th. If the Government in 1877 made an approved survey of the south side of Malheur Lake, which was the north side of lots 3 and 4, no one can disturb this, though at time of survey there were actually lands between the meander line and the water.

12th. The middle of the road or body of non-navigable water, is the true boundary not the meander line.

13th. If plaintiff was the owner of lots 3 and 4, and there are lands between the meander line of those lots and the lake itself, plaintiff is owner of the intervening lands, provided plaintiff is not estopped as pleaded,

14th. Estoppel fails if at time of the acts pleaded title was not in plaintiff.

15th. A lake is a body of water collected in a hollow of the earth. It is not necessary that it be wholly open.

The foregoing were given at plaintiff's request.

The following given at defendant's request were excepted to :

P. 51 of the Record.

1st. Plaintiff must succeed by his own title, and must convince you of the preponderance of evidence.

This is correct law. If no further instructions were given showing that the record title sustained the burden of proof and plaintiff had denied further explanation, it is evident it could have had them.

It is also evident that this could not and did not mislead the jury or anyone.

2d. The existence of a *meander line* is not conclusive as to the existence of a *lake.*

This seems to us sound for the reasons already given. The plats are conclusive as to the *meander* line. If there was a lake, the plaintiff would take all land between the meander line and the water, and all accretions ; but if there were no lake at the time of platting, there could be no intervening land and no accretion by reliction.

3d. To the effect that a swamp is not a lake.

This is true in fact and law. Had the land been swamp at the time of the survey, the State of Oregon was entitled to it as *swamp*—not as *riparian* owner. While it may be true a riparian swampland owner takes riparian rights, we do not understand it to be

true that an abutting owner on *mere* swampy land takes that swampy adjacent land by riparian right.

4th. To the effect that any preponderance of evidence must show that about March 12, 1860, said lots were bounded on the north by Malheur Lake.

5th. Preponderence of evidence must show that said lots bordered on the meander line, and that land in question is due to accretion.

It is not fair to any *nisi prius* court to split hairs and draw fine verbal distinctions.

Counsel insisted in argument on the misleading quality in such words as "adjoining" (14th Except., p. 51), "immediately north of" (15th Except., p. 51), "bounded on the north by" (16th Except., p. 52). But review the entire instructions so far as they appear here, and it becomes apparent that the use of such words was well qualified and interpreted by the careful instructions; that the owner of lots bounded by a meander line took to the water regardless of the meander line; that all lands made by reliction were the property of the riparian owner; that the meander line was conclusive; that the only questions open to them (the jury) were: Did plaintiff have title to Lots 3 and 4? Was there a lake in front of Lots 3 and 4? And, if both questions were answered in the affirmative, then, by conclusion of law as given by the Court, the owner of Lots 3 and 4—that is, the plaintiff—took all land intervening between the meander line and the lake no matter how much. We submit the jury had the law fairly and clearly given to them as a whole. They well understood the whole situation. If one indulged in refinements one could say that "immediately

in front of " might mean immediately to the north of, though a mile away. "Adjoining" and "bounded by" might mean the lots were in *law* "adjoining" or "bounded by;" that is to say, disregarding the meander line the prolongation of the lots, as authorized by law, touched the water or "adjoined" it.

Conclusion.

There is no error in this record. Certainly no prejudicial error. According to the record Mr. Lair Hill only came into the case for the purposes of the writ of error. His assignments of error are his own interpretations stated in his own language. The only record of what the Court charged or refused to charge is the bill of exceptions.

This record is plaintiff's own, and he is bound by it. If there be inconsistencies they must be decided against him. We add these remarks because counsel in argument insisted there were inconsistencies between the assignment of error and the charge to the jury, as shown by the bill of exceptions.

Respectfully submitted,

C. E. S. Wood,
Attorney for Defendant.

Lionel P. Webster,
Thomas D. Rambaut,
Of Counsel.

desired
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Supreme Court of the United States.

No. 124.—October Term, 1901.

The French-Glenn Live Stock Company, Plaintiff in Error, vs. Alva Springer. } In error to the Supreme Court of the State of Oregon.

[April 7, 1902.]

This was an action brought, in 1896, in the Circuit Court of Harney County, State of Oregon, by the French-Glenn Live Stock Company, a corporation of the State of California, against Alva Springer, to recover possession of a certain tract of land situated in said county. The action was tried in May, 1897, and resulted in a verdict and judgment in favor of the defendant. The cause was subsequently taken to the Supreme Court of Oregon, and by that court, on August 11, 1899, the judgment of the Circuit Court was affirmed; and thereupon a writ of error was allowed by the Chief Justice of that court, and the cause was brought to this court.

The facts of the case, as developed at the trial, were thus stated by the Supreme Court:

"The plaintiff, to support its contention of ownership of the fee, offered in evidence, (1) the official plat of the United States government survey of fractional township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appears to have been approved by the Land Department of the government and filed in the local office on September 17, 1877; the plat shows said lots as bounded on the north by the meander line of Malheur Lake; (2) the field notes of the survey of the exterior boundaries of said township and its subdivisions, and the meander line of Malheur Lake, under the title heading, 'Meanders of the south shore of Malheur Lake, through fractional township 26,' etc., and indicating that it was run 'with the meander of the lake;' (3) a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; (4) two patents from the United States, for said lots 3 and 4, section 34, and 1 and 2, section 35, 'according to the official plats of the survey of the said lands returned to the General Land Office by the surveyor general.' The patents bear date March 10, 1890, and October 8, 1891, respectively. The lots contain, in the aggregate, 158.53 acres; (5) two conveyances from the State, comprising the above-described lots, bearing date October 7, 1889, and April 30, 1890, respectively, and other mesne conveyances to the plaintiff; and (6) oral evidence, tending to prove that in 1877, and

for some years thereafter, Malheur Lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some 12 or 15 miles west of the lands in dispute, which separated its waters from those of Harney Lake; that its waters were from 8 to 12 feet higher than those of Harney Lake; that, in 1881, the waters of Malheur Lake, overflowing the ridge, cut a channel through, which was enlarged from year to year for some time; that, as a result, its surface was lowered, the waters receding from the flat shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884. This constituted the plaintiff's case. On behalf of the defendant, evidence was introduced tending to show that there never was a lake in front of the said lots; that Malheur Lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of said lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake, and no consequent reliction of land in front of the said lots."

Mr. Justice SHIRAS delivered the opinion of the Court.

The parties to this contest both claim under titles derived from the United States—the plaintiff in error under patents granted to the State of Oregon under the swamp land grant; the defendant in error under the homestead laws.

To support its contention the plaintiff in error put in evidence, at the trial, an official plat of the government survey of township 26 south, range 31 east, of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appears to have been approved by the Land Department and filed in the local land office on September 17, 1877. The plat shows lots 3 and 4, section 34, and lots 1 and 2, section 35, as bounded on the north by the meander line of Malheur Lake; also, a list of selections of land, made by the agent of the State of Oregon, claimed as swamp and overflowed, with the approval of the Secretary of the Interior, bearing date September 19, 1889; also two patents from the United States for said lots, dated, respectively, March 10, 1890, and October 8, 1891—said lots containing in the aggregate 158.53 acres; also, two conveyances from the State of Oregon, comprising the said lots, bearing date October 7, 1889, and April 30, 1890, respectively, and certain mesne conveyances of said lots, vesting title in the plaintiff in error in 1894; also, oral evidence, tending to prove that in 1877, and for some years thereafter, Malheur Lake was a continuous body of water up to the meander line of that year; that there was a narrow ridge or reef across the west end thereof, some twelve or fifteen miles west of the lands in

dispute, which separated its waters from those of Harney Lake; that its waters were from eight to twelve feet higher than those of Harney Lake; that, in 1881, the waters of Malheur Lake, overflowing the ridge between the lakes, cut a channel through, which was enlarged from year to year for some time; that, as a result, the surface of Malheur Lake was lowered, the waters receding from the flat, shelving shore, leaving the disputed land bare, except in the spring time, from and after 1884.

On the part of the defendant, whose possession began in July, 1888, evidence was put in tending to show that there never was a lake in front of the said lots; that Malheur Lake is a well-defined, natural body of water, but that, if the east and west exterior lines of said lots were extended north indefinitely, they would not touch or intersect the margin or border of the lake, but would leave it entirely to the east thereof; that the water of the lake had been, from a time prior to 1877, of about the same height as it was at the date of trial; that the border of the lake never at any time extended to the supposed meander line of 1877, and that there never had been any recession of the water of the lake and a consequent reliction of land in front of the said lots.

The question of fact, raised by this contradictory evidence, was submitted to the jury, whose verdict decided the issue in favor of the defendant in error.

The land in dispute, in the possession of the defendant in error, was not included within the lines of the original survey, nor in the description of the lots contained in the patents and in the deeds of conveyance under which the plaintiff in error holds, and to add the land in controversy to the lots so described would more than double the area of the land claimed by the plaintiff in error; but the contention of the plaintiff in error was, in the courts below and now is, in this court, that, as the plaintiff in error bought in reliance upon the plats and patents which showed the meander line of the lake, such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned.

Respecting this contention, the defendant in error advances two propositions—first, that the grantee of swamps and overflowed lands takes only such lands as are of that special character, and that this land under the water, forming the bed of the lake, not being of that character, could not pass, even under the facts as claimed to exist under the evidence of the plaintiff in error; and, second, that there never existed a lake in front of or bordering on the plaintiff in error's lots; that if such was the fact, the rule as respects accretion by reason of the alleged recession of the water would not apply; and that as this question was submitted to the jury and found against the plaintiff in error, such finding conclusively determines the controversy.

While it may be conceded that the description of the lots contained in the survey, plats and patents are conclusive as against the government and holders of homesteads, so far as the lands actually described and granted are concerned, such conclusive presumption cannot be held to extend to lands not included within the lines of the survey, and which are only claimed because of the alleged existence of a lake or body of water bounding said lots, whose recession has left bare land accruing to the owners of the abutting lots. We agree with the Supreme Court of Oregon in thinking that the question whether the northern boundary of the lots of the plaintiff in error was an existing lake, the recession of whose waters would leave the bed of the lake, thus laid bare, to accrue to the owner of the lots, was a question of fact which was not concluded by a mere call for a meander line. If, indeed, there had been a lake in front of these lots at the time of the survey, which lake had subsequently receded from the platted meander line, the claim of the owner of the lots to the increment thus occasioned might be conceded to be good, if such were the law of the State in which the lands were situated. But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adopt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line of the fractional section.

In *Niles* v. *Cedar Point Club*, (175 U. S. 300,) a somewhat similar state of facts existed, and it was claimed that the mere call for a meander line gave riparian rights beyond that line. But this court said:

"It is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered on a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

See likewise *Horne* v. *Smith*, (159 U. S. 40,) where a similar ruling was made.

Whether, even if the meander line of the survey really ran along and adjacent to Malheur Lake, the doctrine of *Hardin* v. *Jardasa*, (140 U. S.

384,) and cognate cases, is applicable, is discussed at some length in the briefs. According to that rule, the extent of the title of a government grantee of lands bounded on streams and waters, without any reservation or restriction of terms, is to be construed, as to its effect, according to the law of the State in which the lands lie; and the cases cited show that, in some of the States, it is held that the title of a riparian proprietor extends to the middle thread of the stream, while in others it is held to extend only to the water's edge; and in Massachusetts, and perhaps other States, a distinction is recognized between lands bordering on lakes and ponds, and those bounded by running streams.

But we are not called upon to enter into that discussion in the present case, for the Supreme Court of Oregon reached its conclusion apart from any such question, and expressed itself as follows:

"If there never was a lake in front of plaintiff's lots, or if one did not exist there at the time of the survey, then there was no natural object or monument marking the north boundary of the lots; hence resort must be had to the secondary evidence, viz., the courses and distances which are ascertainable from the plats and surveys, and they must prevail. The result is natural, and the land conveyed would be just what a mathematical calculation would produce from the field notes of the survey of the fractional sections and the supposed meander line. . . . The plaintiff sought to sustain the fact of the actual existence of the lake in front of its lots and upon which they abutted at the time of the survey, and then to show a gradual subsidence of the water of the lake, due to the cutting of the channel from natural causes, through a narrow ridge or reef extending across between Malheur and Harney Lakes, by which the water of the former was drawn off into the latter, and a consequent reliction of the land bordering on said lots, which constitutes the land in dispute, and to which plaintiff claims title. The defendant controverted this position, and sought and introduced evidence tending to show the non-existence of such a lake at the time of the survey, and at all times since; in short, there was support for the whole of his contention. The fact of the existence of Malheur Lake, a non-navigable body of water, was admitted, but there was evidence to show that it lies to the northeast of the lots of the plaintiff, and that no part of it now, or at the time of the survey, extended westward, in front or to the north of them. . . . The issues of fact were clear and distinct, and having been submitted to the jury, there is no reason why their verdict should not preclude the plaintiff, as in other cases when a jury has passed upon a submitted question of fact."

As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented.

For the reasons already given, we think that, while the plats are conclusive as to the meander line, and while if there was a lake abutting on or to the north of the lots, the plaintiff in error would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey nor since, any such lake, and to contend that, in such a state of facts, there could be no intervening land and no accretion by reliction.

The judgment of the Supreme Court of Oregon is

Affirmed.

No. 125.

The French-Glenn Live Stock Company, Plaintiff in Error, *vs.* James Colwell. } In error to the Supreme Court of Oregon.

[April 7, 1902.]

Mr. Justice SHIRAS delivered the opinion of the Court.

The French-Glenn Live Stock Company, a corporation of the State of California, brought an action in the Circuit Court of Harney County, State of Oregon, against James Colwell, to recover lands in possession of the latter, under the homestead laws of the United States. There was a verdict and judgment in favor of the defendant, and that judgment was affirmed by the Supreme Court of Oregon. A writ of error was sued out to this court.

The questions of fact and law in this case are similar to those in the case of *French-Glenn Live Stock Company* v. *Alva Springer*, just decided, and, for the reasons expressed in the opinion in that case the judgment of the Supreme Court of Oregon is

Affirmed.

Mr. Justice HARLAN took no part in this decision.

True copy.

Test:

Clerk Supreme Court, U. S.